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THE MINING REPORTS.

CONTAINING THE CASES ON THE

LAW OF MINES

FOUND IN THE AMERICAN, ENGLISH AND CANADIAN REPORTS.
CHRONOLOGICALLY ARRANGED

WITH NOTES AND REFERENCES.

By R. S. MORRISON and EMILIO D. DESOTO,
OF THE COLORADO BAR.

VOL. XVII.

CHICAGO:
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1903.

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PREFACE.

This volume and the succeeding volumes are a continuation of the Mining Reports, volumes 1–16 published by the same firm and edited by the same compiler now in association with Emilio D. DeSoto of the same bar.

The sixteenth volume was printed in 1894. The present volume contains cases prior to that date which had been omitted and new cases into 1895, to be followed by the decisions handed down in the following years to date of copyright. The only material change in the order of printing is that the cases in this and succeeding volumes follow chronologically under a specific head for each case instead of being grouped under topics as in the original issue.

It is intended to supplement the old with the new volumes so as to make but one set of Reports, the whole intended to be a substantial reprint of all the mining cases of substantial benefit to the profession, and those not printed are cited in the notes appended to the printed cases.

By the present chronological system the set can be and is intended to be continued indefinitely as the accumulation of decisions may warrant the publication of further volumes.

In the Tables of Cases all citations both from the text and the notes which are found in the entire set of Mining Reports are italicized.

R. S. MORRISON,

DENVER, COLORADO, June 9, 1903.

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MINING REPORTS.

VOL. XVII.

HEXT v. GILL.

(Law Reports, 7 Chancery Appeal Cases, 699. Court of Appeal in Chancery. July 22, 1872.)

[1]**Minerals not then known.** A reservation of mines and minerals may include a kind of mineral not contemplated or known to exist at the time of the creation of the reservation.

A bed of china clay is a mineral within the terms of a general reservation.

[2]**A reservation of Minerals includes every substance** which can be got from underneath the surface for the purpose of profit unless there is something in the context or otherwise to restrict its meaning.

[3]**Threat to Mine.** Where a defendant is not taking the minerals but in his defense asserts his right to take them it is a threatening which will justify an injunction for their preservation.

Where surface destruction is incident. The owner of a reservation of minerals in general terms cannot, except by arrangement with the surface owner, work such minerals as can be gotten only by destruction or serious injury to the surface.

Construction of deed as to description holding a certain parcel known as "Greys," as not conveyed, although leaving out its area left the recited acreage that much short.

This was an appeal by the Plaintiffs from a decree of Vice-Chancellor WICKENS dismissing the bill.

[1] *Gibson* v. *Tyson*, 13 M. R. 72.
[2] *Atty. Gen.* v. *Tomline*, L. R. 5 Ch. D. 750.
[3] *Gibson* v. *Smith*, 15 M. R. 111.

The text is followed and enlarged in *Johnstone* v. *Crompton*, L. R. 2 Ch. 197 (1899), giving mineral substances absolutely to the reserve:

By deed or certificate of contract dated the 4th of January, 1799, under the hand of the Surveyor-general for the Duchy of Cornwall, and executed in accordance with the acts for the redemption of land tax, the then Duke of Cornwall, as lord of the manor of Treverbyn Courtenay, conveyed to Charles Rashleigh the fee simple and inheritance of "All that customary or copyhold tenement, called Greys, with the appurtenances, parcel of the before mentioned manor of Treverbyn Courtenay, consisting of a house, garden, farm-yard, mowhay and offices, containing by admeasurement 3R. 33P., with divers closes and parcels of ground, containing also by admeasurement 103A. 1R. 39P., or thereabouts (that is to say)" (here followed parcels, concluding with) "and a parcel of land running with Garka Moor, containing 27A 2R., which said tenement called Greys is now held for the life of John Hext, gentleman, under the yearly rent of 15s. 3d., by copy of court roll bearing date the 20th of September, 1771, together with all timber trees, and other trees, waters, watercourses, roads, ways, easements, commodities, profits, privileges, emoluments, and advantages whatsoever to the said several and respective premises belonging or appertaining." The deed contained the following exception and reservation:

"Excepting nevertheless and always reserving unto his said Royal Highness the Prince of Wales, his heirs and successors, Dukes of Cornwall, all mines and minerals within and under

"It cannot be that the test is whether the minerals can be worked at a market profit at the time."

But common clay forming part of the subsoil is not covered by an ordinary mineral reservation. *Glasgow* v. *Farie*, L. R. 13 App. Cas. 657.

And the term minerals in a statutory reservation will not be construed as strongly in favor of the mineral claimant as in the case of a reserve by contract. *Great Western Ry.* v. *Blades*, L. R. 2 Ch. Div. 624 (1900).

The terms and context of different deeds being considered, marble was held to be a reserved mineral, (*Phelps* v. *Church of Our Lady*, 115 Fed. 882) and granite to be not a mineral. *Armstrong* v. *Lake Champlain Co.*, 147 N. Y. 495.

the said several and respective premises, or any part thereof, together with full and free liberty of ingress, egress, and regress to and for his said Royal Highness, his heirs and successors, and his and their officers, agents, and workmen, and to and for the lessee or lessees of his said Royal Highness, his heirs and successors, and the agents and workmen of such lessee and lessees, into and out of the said several premises and every part thereof, with or without horses, carts, and carriages, to dig and search for, and to take, use, and work the said excepted mines and minerals."

In the next month Rashleigh conveyed the above premises to Samuel Hext (who was entitled to the copyhold interest in the property), his heirs and assigns. The plaintiffs were the successors in title of Samuel Hext.

The Plaintiffs alleged that a certain part of Garka Moor, which was not inclosed, but was distinguished by certain landmarks, was the 27A. 2R. mentioned in the conveyance. This was distinguished in the bill as "the uninclosed part of the Greys estate." Under this land, as well as under the inclosures of the Greys estate, was a bed of china clay. The defendants Gill and Ivimey, who had become entitled to the mines and minerals comprised in the above reservation, had granted in 1868 a lease to the defendants, Derry and Scott, of the china clay under certain lands, including the twenty-seven acres and the greater part of the Greys estate. Under this lease Derry and Scott got a quantity of china clay from under that part of the moor which the plaintiffs claimed as the uninclosed part of the Greys estate; and on one occasion, more than a year before the filing of the bill, they entered on some of the inclosed lands with the intention of getting china clay there, which intention however they almost immediately abandoned, and did not again enter. The getting of china clay is carried on by open workings which cause an entire destruction of the surface, and it was admitted on both sides that the clay could not be got otherwise.

The plaintiffs filed their bill alleging that the lessees threatened to enter, if they had not already entered, upon the Greys estate; as well the inclosed as the uninclosed parts thereof; and to commence working for china clay thereon. The plaintiffs charged that the china clay was not a mineral included in the reservation of mines and minerals, and that no one entitled to the mines and minerals under the reservation had any authority to get them by open workings. The bill prayed for an injunction to restrain the defendants from getting china clay out of the Greys estate, and for an account of the china clay already gotten.

The defendants Gill and Ivimey, by their answer, stated that in or about the reign of Henry VI. the ancient manor of Treverbyn, having devolved upon two co-heiresses, was divided into two manors, Treverbyn Courtenay, and Treverbyn Trevanion, and that certain ancient tenements of the manor of Treverbyn were allotted in severalty to the two new manors; but that the wastes, of which Garka Moor was part, were not so allotted, but were held in common. They went on to say that the Greys estate was allotted to Treverbyn Courtenay; that it consisted entirely of old inclosures, and that there was no uninclosed ground belonging to it; and that the manor of Treverbyn Courtenay was in 1799 the property of the Duchy of Cornwall, the manor of Treverbyn Trevanion belonging to another owner. In 1856 Gill and Ivimey purchased the manor of Treverbyn Courtenay, with all its rights and appurtenances; and in 1859 the manor of Treverbyn Trevanion. They thus became owners of the soil of the entirety of Garka Moor. They denied the title of the plaintiffs to the uninclosed land alleged to form part of the Greys estate, and denied that any china clay had been gotten out of any land to which the plaintiffs were entitled. They went on to say that the lessees had not "any present intention" of entering upon the Greys estate for the purpose of getting china clay or any other mineral; and that it was the desire of them (Gill and Ivimey) that the Greys estate "should not at present be interfered

with;" and that Derry and Scott, in compliance with that desire, had abstained from interfering with it. But they (Gill and Ivimey) insisted that by reason of the reservation they were entitled to the china clay within the limits of the Greys estate, and to work for and get it by open pits and workings from the surface; such being, in fact, the only practicable mode of getting it. They allege that open workings from the surface, by streaming for tin, had taken place from time immemorial on the Greys estate.

Derry and Scott, by their answer, said that they had entered on part of the Greys estate with the intention of getting china clay, which intention, at the request of Gill and Ivimey, they had almost immediately abandoned; and that, having been requested by Gill and Ivimey to desist from working there, they had no present intention of entering upon the estate.

The defendants also stated, by their answer, that they had not done any damage to the Greys estate except once, by accident, when a landslip took place into their workings close to the boundary of Greys.

The process of getting china clay was thus described in the plaintiff's evidence; the correctness of which, in this respect, was not disputed:—

"Granite consists of quartz, felspar, and mica; and china clay consists of decomposed granite in which felspar exists in considerable proportions. To make china clay fit for the market, the felspar, which alone is merchantable, has to be separated from the other component parts of the said decomposed granite. The working for china clay is commenced almost in the same manner as quarrying for building stone, namely, by the removal of the soil covering the clay, which lies in beds of more or less thickness. The working is then carried on by turning a stream of water over the head of the clay, when so arrived at, and washing the same forward into channels and reservoirs; in which reservoirs the pure clay is held in solution, and separated from the impurities, by the

same impurities, which are heavier, being precipitated to the bottom of the reservoir, while the pure clay is allowed to run forward, over the top of the reservoir, into a pit where it settles down, and is dried and made solid, either by exposure to the sun or by a drying kiln, after which it is fit for sale in the market. The injury done in clay working to the surface of the land is the total, or the almost total destruction of the surface where the excavations are made; for the clay is excavated to a depth which renders the land useless for agricultural purposes; either by the loss of all soil suitable for such purposes, or by reason of the cost of refilling and levelling the pits excavated being greater than any return to be obtained from the imperfect restoration of the land for agricultural purposes."

"Streaming" for tin appeared from the evidence in the cause to be the usual ancient way of getting tin in Cornwall. It was a process for obtaining grain tin by means of washing; and it was necessarily carried on entirely by means of open workings. There was some conflict of evidence as to whether the surface was irreparably destroyed by it; the plaintiff's evidence going to show that the land was often filled in and levelled, and the soil replaced when the working was over; and the defendant's evidence making the destruction of the surface appear to be as complete as in the case of working for china clay. In modern times tin had been obtained by mining to a much greater extent than before. There was a conflict of evidence as to whether tin works had been carried on within the Greys inclosures. There was some evidence to show that before the grant in 1799, china clay had been gotten in an adjoining parish, but it had never been gotten in the parish in which Greys was situate, nor was any gotten out of any of the lands of the duchy of Cornwall till some years after that time.

With respect to the twenty-seven acres, it appeared in evidence that the tenants of Greys had for a considerable number

of years treated themselves as entitled to the exclusive use of it to this extent, that they alone cut the furze and took turf from it, and occasionally for the purpose of sale. It appeared also that the owners of other tenements took turf exclusively from certain other portions of Garka Moor; the twenty-seven acres not being fenced off, although distinguished by landmarks. There was a mass of conflicting evidence upon the result of which the court came to the conclusion that the twenty-seven acres did not in 1799 form part of the copyhold tenement called Greys. There was, however, nothing else answering to the 27A. 2P. mentioned in the conveyance, nor could the 103 acres be made up without including it.

Vice-Chancellor Wickens considered that the terms of the reservation justified the defendants in getting the china clay in the way in which they were getting it, and he dismissed the bill.

The plaintiffs appealed.

Mr. MANISTY, Q. C., Mr. EDDIS, Q. C., and Mr. BOGER, for the appellants:

A reservation of mines and minerals has commonly been understood as applying only to substances, got by mining as distinguished from quarrying or open workings. *Darvill* v. *Roper*, 3 Drew, 294; *Brown* v. *Chadwick*, 7 Ir. Com. Law Rep., 101, and *Listowel* v. *Gibbings*, 9 Ibid., 223, all support this view. The meaning of the word "mine" is shown by *Rex* v. *Brettell*, 3 B. & Ad., 424, *Rex* v. *Dunsford*, 2 A. & E., 568, and *Rex* v. *Inhabitants of Sedgley*, 2 B. & Ad., 65. But even if the words "mines and minerals" cannot be so far restricted, such a construction must be put on the reservation as will not allow it to be destructive of the grant; and it cannot be held to allow a mode of working which will cause a complete destruction of the surface where there is no provision for compensation. *Bell* v. *Wilson*, Law Rep., 1 Ch., 303, is decisive on this

point, and must be overruled if the decision under appeal is to stand. This is supported by the analogy of the cases in which it has been held that, in the absence of very clear words, working which causes a subsidence of the surface is not authorized, though there be a provision as to compensation for damage done to the surface. *Harris* v. *Ryding*, 5 M. & W., 60; *Humphries* v. *Brogden*, 12 Q. B., 739; *Smart* v. *Morton*, 5 E. & B., 30. In *Duke of Buccleuch* v. *Wakefield*, Law Rep., 4 H. L. 377, under very special words, it was held that the mine owner might destroy the surface; but that conclusion evidently would not have been come to if, as here, there had been no provision for compensation. The cases of *Hilton* v. *Earl Granville*, 5 Q. B., 701; *Roberts* v. *Haines*, 6 E. & B., 643, and *Blackett* v. *Bradley*, 1 B. & S., 940, show how strongly the courts lean against allowing a complete destruction of the surface. *Bullen* v. *Denning*, 5 B. & C., 842; *Midgley* v. *Richardson*, 14 M. & W., 595., and *Hedley* v. *Fenwick*, 3 H. & C., 349, show the inclination to put a restricted construction on such reservations. The question as to the twenty-seven acres is proper to be tried at law.

(Both parties here concurred in requesting that the court would decide on the question of title.)

Then we say, on the evidence, that the twenty-seven acres were always part of the Greys, but if not, the grant of 1799 must be held to pass them, as the quantity of land thereby expressed to be conveyed cannot be made up without them.

The solicitor-general (SIR G. JESSEL), Mr. KARSLAKE, Q. C., and Mr. PHEAR, for the respondents:—

Upon the evidence, we say that the twenty-seven acres never formed part of Greys, but were part of Garka Moor, and the right of the lord of the manor to get every kind of mineral substances from under the moor by open workings is not

questioned by the bill. The conveyance of 1799 only purports to convey what constituted the copyhold tenement called Greys; the acreage is mere matter of description, and its being too large does not show an intention to grant more than the copyhold, and if it did the lord of Treverbyn Courtenay had only an undivided moiety of Garka Moor; so that the plaintiffs could not have got the entirety of the twenty-seven acres. Our working on the twenty-seven acres, therefore, cannot be restrained, and there has been nothing but an accidental encroachment on the old inclosures with an express denial of an intention to work there. The allegation, therefore, that we threaten and intend to interfere with any ground on which we have no right to work is not made out, and the court will not interfere to restrain trespass unless a case of irreparable damage is shown. The plaintiff's case therefore fails: *Gibson* v. *Smith*, 2 Atk., 182; *Mogg* v. *Mogg*, 2 Dick., 670; *Mitchell* v. *Dors*, 6 Ves., 147; *Smith* v. *Collyer*, 8 Ibid., 89; *Courthope* v. *Mapplesden*, 10 Ibid., 289; *Kinder* v. *Jones*, 17 Ibid., 110; *Earl Cowper* v. *Baker*, Ibid., 128; *Thomas* v. *Oakley*, 18 Ibid., 184; *Davenport* v. *Davenport*, 7 Hare, 217; *Haigh* v. *Jaggar*, 2 Coll., 231; *London and North-Western Railway Company* v. *Lancashire and Yorkshire Railway Company*, Law Rep. 4 Eq. 174. But we say that, even under the old inclosures, we are entitled to get the china clay by the usual mode of working. The reservation includes the china clay, which certainly comes within the term "minerals"; *Micklethwait* v. *Winter*, 6 Ex., 644; *Midland Railway Company* v. *Checkley*, Law Rep. 4 Eq., 19; *Earl Rosse* v. *Wainman*, 14 M. & W., 859. The words "mines and minerals" cannot be cut down unless there is some explanatory context to restrict them. The reservation of minerals includes a right to get them, though to the destruction of the surface: *Rowbotham* v. *Wilson*, 8 H. L. C., 348; *Duke of Buccleuch* v. *Wakefield*, Law Rep., 4 H. L., 377. We therefore must be entitled to get the china clay in the only way in which it can be gotten; and, moreover, express power to

dig for it is given. The cases in which it was held that the surface must not be let down were cases where the court had not before it the instrument under which the mine owner derived title, and do not apply where the instrument gives a right to work. Still less can they apply where the mineral is one which can only be got by destroying the surface. They only show that workings must not be carried on in such a way as to produce damage which may be avoided. It is clear that this reservation includes tin and the right to get it. But at the time of the grant the usual mode of getting tin was streaming, which is as destructive to the surface as the getting of china clay.

(They also referred to *Earl Beauchamp* v. *Winn*, Law Rep. 4 Ch., 562.)

Mr. MANISTY, in reply, referred to *Dugdale* v. *Robertson*, 3 K. & J., 695, and *Roads* v. *Overseers of Trumpington*, Law Rep., 6 Q. B., 56.

July 22. SIR G. MELLISH, L. J.:—

This is a suit instituted by the owners of a small estate called Greys, in the county of Cornwall, against the lords of the manors of Treverbyn Courtenay and Treverbyn Trevanion and their tenants, to restrain them from getting china clay under the property called Greys, which is alleged in the bill to consist of old inclosures and of about twenty-seven acres of uninclosed land. The title of the plaintiffs to the inclosed part is not disputed, but as respects the uninclosed part the defendants deny the title and also the possession of the plaintiffs, and say: that what is in the bill styled the uninclosed part of Greys is in fact part of Garka Moor, and that they, as lords of the two manors, are entitled to the soil of that moor. This raises a question of title which ought properly to be tried at law by an action of ejectment; but both parties have

requested us to decide the question instead of sending them to law, and therefore before I go into the remaining questions I will deal with that question of title.

(His lordship then stated the cases made by the plaintiffs and defendants as to the uninclosed twenty-seven acres, and the evidence as to the extent of the copyhold tenement, and continued:—)

We have to decide as a question of fact what is the result of that evidence. In the first place, nobody can doubt that before the manors were separated Garka Moor was a waste common, the freehold of which was in the lord of the manor of Trevanion, the copyholders having only certain rights over it. That being so, whenever the manor was divided into two it is difficult to say that what was freehold and not copyhold could by any legal means become annexed to the copyhold estate called Greys, so as to become part of it, and whether it could be so annexed except by Act of Parliament is doubtful. It appears to us, judging as a jury would upon the question of fact, that the proper way to reconcile the whole of the evidence is to presume that at some time, possibly at the very time when the manors were separated, the tenants who had a right of common over the Garka Moor common being but few, an arrangement was come to between them, possibly with the consent of the lord, that each of them should enjoy a separate common right to take the pasture and turf off a particular portion of the common instead of their equally enjoying it together.

If we suppose that to have taken place, Mr. Spry, who made for the duchy the old map and terrier which have been produced, finding that state of things, might naturally come to the erroneous conclusion that a certain portion of the waste was part of the copyhold called Greys, and lay it down in his map as being so. All the evidence will thus be accounted for. The result is that this piece of moor was part of the moor which the two lords held as tenants in common in moieties,

and was not part of the copyhold estate called Greys. Then it was argued on behalf of the plaintiffs that because the parcels of the deed of 1799 include a parcel of land running with Garka Moor containing twenty-seven acres, and these twenty-seven acres cannot be found in the inclosed part of Greys, therefore twenty-seven acres (although how we are to get the bounds I do not know) are to be taken out of the moor. That I think is not the true construction of the deed. The deed professes to convey "all that customary or copyhold tenement called Greys," and the rest is simply a description of what is contained in Greys, and it is said besides: "which said tenement called Greys is now held for the life of John Hext gentleman, under the yearly rent of 15s. 3d. by copy of court roll." It appears to me that nothing but what was part of the customary or copyhold tenement called Greys could pass under that, notwithstanding there might be any misdescription in the parcels. If the tenement called Greys was entitled to an exclusive right of common over a portion of the moor which by mistake had been treated as if it were parcel of the copyhold tenement, the consequence would be that the exclusive right of common would pass, but the property in the soil would not pass. Therefore, upon the whole, I come to the conclusion that the plaintiffs have not made out their title to what they call, as I think erroneously, the uninclosed part of Greys, and therefore cannot have any relief respecting it, the bill not being framed for raising the question whether the getting china clay can be complained of by persons only entitled to rights of common over the land.

Then I come to the question whether the plaintiffs are entitled to relief respecting the inclosed part of Greys. Mr. Karslake raised the objection that the defendants have not threatened to get, and have not—except by mere accident—got any china clay in Greys; and therefore that this court ought not to grant an injunction, or enter into the question whether they are entitled to get it or not.

The facts upon this part of the case are these: It appears that the first two defendants, as lords of the manor, have let to the two other defendants the right to get china clay in the waste and over a large portion of the estate called Greys, and therefore they profess to exercise the right of ownership over it, and they have professed to give them the power to get china clay from Greys in the ordinary way in which china clay is got in that neighborhood. It appears that the lessees have entered on one occasion into the estate called Greys with the intention of getting china clay, though they did not get any, and did not remain there. The bill being filed and the question raised, the defendants being sought to be restrained from getting china clay, they say: "We have a title to get china clay out of the estate called Greys, and we are entitled to get it in the way in which it is ordinarily got; but we have no present intention of getting it." We are of opinion that after this it is idle for the defendants to say they do not threaten to get the china clay under the inclosed part of Greys, and to contend that this court is precluded from deciding the question whether they are entitled to get it in the way in which they say they have a right to get it.

That brings us to the real question on the merits, whether the defendants, having had the manor of Treverbyn Courtenay conveyed to them, have a right to get the china clay under the reservation and exception in the deed of 1799.

The first question to be determined is whether the china clay is within the exception of "mines and minerals." Now china clay is thus described:—(His Lordship here read the account of china clay, and the mode of getting it, from the plaintiffs' evidence, as above.)

Is this china clay reserved under the exception of "mines and minerals"? There was a great deal of discussion before us as to the meaning of the word "mines," whether it is confined to underground working, or may possibly extend to open working, or whether it does

not apply to the workings at all, but in this sort of reservation means the metal, the veins, and seams themselves, which are in a secondary sense called "mines." I think that it is not necessary here to go into those questions, for whatever may be the meaning of the word "mines" when used alone, it is here combined with the more general word "minerals," and the authorities seem to show that where there is an exception of "mines and minerals," the putting the word "mines" before "minerals" does not restrict the meaning of the word "minerals." Many authorities, some at law and some in equity, have been brought before us to show what is the meaning of the word "minerals." But the result of these authorities, without going through them, appears to be this: That a reservation of "minerals" includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the court to give it a more limited meaning. Ought it to have a more limited meaning in the present case? The circumstances, as far as they are material to be stated, are these: The seller was the lord of the manor. What he sold was the freehold of a copyhold tenement. Now the lord of a manor is, beyond all question, entitled to all the minerals, in the most general sense of the word, under a copyhold tenement. There is nothing to be got out of the soil and sold for a profit which the copyhold tenant, in the absence of some special custom, is entitled to get without the permission of the lord; the property of it is in the lord, although it is true that, in the absence of special custom, the lord cannot get it without the license of the tenant. The position of the parties, therefore, furnishes no reason for restricting the meaning of the word "minerals," and there being no special words before "mines and minerals" which might furnish an argument for restricting them to things *ejusdem generis*, I am of opinion that the surface, and all profit that can be got from cultivating the surface, or

building on it, or using the surface, is intended to be conveyed, but that the right to everything under the surface, and to all profit that can be got from digging anything out from under it, is intended to be reserved. I am therefore of opinion that china clay is included in the reservation. The only argument against this is that china clay cannot be got without destroying the surface, and that it could not be intended to give power wholly to destroy the surface without compensation. The case of *Bell* v. *Wilson*, Law Rep. 1 Ch., 303, appears, however, to be a direct authority that the mere circumstance that a mineral cannot be got without destroying the surface, though it may be a very strong ground for holding that the owner of the mineral is not entitled to get it, is not a ground for straining the meaning of the word "mineral." In that respect the lords justices differed from Vice-Chancellor Kindersley, and we are bound by their decision.

Then we come to the important question, whether there is power to get this china clay in the only way in which, according to the concurrent testimony of all the witnesses, it can be got, by a process which utterly destroys the surface of the land. A great number of cases were cited to us upon that point, in none of which was the language exactly similar to that in the case before us, and they must be referred to merely for the purpose of getting a principle from them. Now the cases show that where the ownership of minerals is separate from the ownership of the surface, *prima facie* the owner of the surface is entitled to have his surface supported by the minerals. That is not confined, as contended by the solicitor-general, to the case where the court has not before it the instrument under which the owner of the minerals derives his rights, but it also applies to cases where the court has the instrument before it, for the purpose of construing the instrument, to this extent, that *prima facie* the right to support exists, and the burden lies on the owner of the minerals to show that the instrument gives him authority to destroy what is described by

the judges as the inherent right of a person who owns the surface apart from the minerals. The question is, whether the words of the reservation in the present case mean that the ownership of the surface is altogether to be subject to the ownership of the minerals, so that the owner of the minerals may do whatever is necessary for the purpose of enabling him to get them, although it may of necessity utterly destroy the surface; or do the words, according to their true construction, only give a right, in the nature of an easement, to go upon the surface and dig through it for the purpose of getting at the minerals underneath? In my opinion, the short and ambiguous words of this reservation, according to their fair construction, only give a right to create what I may call temporary damage, and do not authorize the owner of the minerals absolutely to destroy or to cause a serious continuous and permanent injury to the surface.

Now, if we refer to the authorities, we find that there are several cases relating to the right of the owner of minerals to let down the surface in the course of getting the minerals by pure mining—cases in which the power of getting the minerals has been given in far stronger language than it is in the present case, where, nevertheless, the courts held that he was not entitled to get the whole of the minerals if that involved the destruction of the surface, but that in getting them he must have regard to the rights of the owner of the surface to support by the minerals. In *Harris* v. *Ryding*, 5 M. & W., 60, the power was this: "With full liberty of ingress, egress, and regress to come into and upon the thereby appointed and granted and released premises to dig, &c., the said mines, &c., and every part thereof, and to sell and dispose of, take and carry away, whatever might be there found at their or his respective wills and pleasures; and also to sink shafts, &c., for the raising up, working, carrying away, and disposing of the same or any part thereof, making a fair compensation to T. P. (the grantee) for the damage to be done to the surface of

the said premises and the pasture and crops growing thereon." In *Roberts* v. *Haines*, 6 E. & B., 643, the owner of the minerals was expressly authorized "to search for, dig, get and raise any coal and ironstone lying and being in or under the commons and waste lands, and to erect any work or works for that purpose, and to dig and take earth for making and to make bricks for any such work or works; and to carry away and dispose of such coal and ironstone to and for his and their own use." In *Smart* v. *Morton*, 5 Ibid., 30, the words were: "With free leave and liberty to sink, work and win the same in any part of the said premises, and to drive drift or drifts, make watergate or watergates, or use any other way or ways for the better and more commodious working and winning the same in the said hereby granted or intended to be granted, premises, or any part thereof." In *Bell* v. *Wilson*, Law Rep. 1 Ch., 303, which is a most important authority, since it related not merely to the letting down of the surface by working underground, but to the working from above, the words of the reservation are such that the case appears to me almost decisive of the present. I believe it will be found that every single word contained in the present power is contained in the power in *Bell* v. *Wilson*, along with many other words; yet under that reservation, worded in a way more favorable to the owner of the minerals than that with which we have to deal, the lords justices held that although stone was reserved as a mineral, yet there was no right to get it by quarrying.

There are, however, two cases which ought to be referred to, in which the House of Lords held an owner of minerals entitled to let down the surface or absolutely to destroy the surface for the purpose of getting the minerals. The first of those cases is the case of *Rowbotham* v. *Wilson*, 8 H. L. C., 348. In that case there was a covenant which the House of Lords construed to be a grant that the mines should be held and enjoyed, worked and gotten, "without any molestation, denial, or interruption of any other person or persons parties to these

presents, and those claiming under them respectively, who for the time being are or may be owner or owners of the surface of the lands under which such mines are situate, and without being subject or liable to any action or actions for damage on account of working and getting the said mines for or by reason that the surface of the lands aforesaid may be rendered uneven and less commodious to the occupiers thereof by sinking in hollows or being otherwise defaced and injured where such mines shall be worked." The instrument, therefore, said in terms that the surface might be let down, and no doubt the House of Lords decided contrary to what was said in the judgment in *Hilton* v. *Earl Granville*, 5 Q. B., 701, that such a grant, where it is clearly expressed, is not void. Again, in the case of the *Duke of Buccleuch* v. *Wakefield*, Law Rep. 4 H. L. 377, the House of Lords held that power was given absolutely to destroy the surface. That is the only case which resembles the present, in this, that it related to a peculiar kind of mineral which could not be got at all without destroying the surface. But if that case is looked into it will be found to differ from the present in three most material respects. In the first place, the iron ore, which was the mineral then in question, had been got in very large quantities by the lord of the manor before the act of Parliament for inclosing the waste was passed. It was a most valuable mineral, so that it was impossible to suppose it not to have been in the contemplation of the parties at the time they obtained their act, and it was proved that the lord of the manor had constantly let similar iron mines in the manor, paying compensation for the damage which was done. In the next place, without stopping to read the whole of the reservation in that case, it will be found that it contains far more extensive words than the reservation in the present case. In contained powers which, as is pointed out in the judgments, clearly enabled in certain events the surface to be destroyed. There was an unlimited power to deposit the refuse of the minerals on the

surface, and there was unlimited power of erecting buildings upon the surface, and there were at the end most general words enabling every power to be exercised which was necessary to get the minerals. In the last place, there was a clause which enabled full compensation to be given for any damage that might be done. Taking the whole of these circumstances into consideration, the House of Lords, reversing the decision of Vice-Chancellor Malins, came to the conclusion that, according to the true meaning of the act, the lord of the manor was to be entitled, if he found it necessary for the purpose of getting what was known to all parties to be a most valuable mineral, to destroy the surface on making compensation; or, in substance, that, for the purpose of getting the minerals, he should have power to buy the surface back, paying the full value for it. I think that no one can read the judgment without coming to the conclusion that if the provision as to compensation had not been there the House of Lords, notwithstanding the strength of the other words, would in all probability have come to a different conclusion. In the present case there is no reason to suppose that the parties had china clay in contemplation at the time when the deed was executed. There is, indeed, one old man who proves, and I do not dispute the correctness of what he says, that china clay was at the time being got in one neighboring parish, but it is proved that it was not got in the parish in question for a great many years afterwards. And it is also proved that it was not until years after this that the Duchy of Cornwall received any dues for getting china clay. Upon the whole, therefore, I come to the conclusion that the words here used are not sufficiently clear to give the owner of the mines the absolute power of destroying the surface, and that the defendants have not the right they claim.

There is one argument that I should, perhaps, notice. It was urged that streaming for tin had been used in Cornwall from time immemorial; that therefore it was impossible to

suppose that the right of streaming for tin was not intended to be reserved; and that, as streaming for tin involved an injury to the surface of the same kind, if not quite to the same extent, as the taking of china clay, the fact that taking the china clay involved the destruction of the surface was no sufficient reason for holding the right to take it not to be reserved. I do not wish to give any decisive opinion whether the right of streaming for tin is reserved or not, as that question is not before us, and may be of very great importance. That question does not stand quite on the same footing as the question relating to the taking of china clay. There is no doubt that streaming for tin was a thoroughly well-known and common process. At the same time, tin might be got by mining, and the owner of the minerals would not, by being precluded from streaming, be deprived of all power to get it, and, as at present advised, I do not think that the words of the power in the present case are sufficient to confer a right of streaming for tin. When an owner of both surface and minerals sells the surface and reserves the minerals, with power to get them, he ought, if he intends to have the power of destroying the surface in getting them, to frame his power in such language that the court may be able to say that such was clearly the intention of the parties. The vice-chancellor in his judgment fully acknowledged the difficulty that, if the defendants had the right to take china clay, the reservation might be absolutely destructive of the grant, but said he could not see where he was to fix the limit to the reservation if its words were not to be taken according to their full and strict meaning. I feel myself that it is very difficult to say where the limit is to be placed. It is very difficult to lay down exactly what the owner of minerals may do for the purpose of getting them; but I do not think it would be right or just to the owner of the surface to say that his surface may be destroyed because there may be a difficulty in saying exactly what the owner of minerals may do and what he may not do

in every case. In the present case I think the result is this, that the general reservation of minerals includes the china clay, a mineral the existence of which apparently was not known to the parties at the time when the instrument was executed, and which cannot be got without destroying the surface. It appears to me that the fair result of that state of things is that the lord of the manor is practically in the same position as he would have been in if this had remained a copyhold tenement, viz., that the right to the clay is in him; but inasmuch as he has not reserved the power to destroy the surface, and inasmuch as this clay cannot be got without destroying the surface, he cannot get the clay unless he can make some arrangement with the owner of the surface. I am, therefore, of opinion that the plaintiffs are entitled to have an injunction to restrain the defendants from getting the china clay in such a way as to destroy or seriously injure the surface; but as they have failed in one most essential part of the case—namely, the part relating to the twenty-seven acres—they ought to have no costs.

SIR W. M. JAMES, L. J.:—

I entirely concur both with the conclusions and reasoning of the Lord Justice. The long and uniform series of authorities appear to me to have established a very convenient and consistent system, giving the mineral owner every reasonable profit out of the mineral treasures, and at the same time saving the landowner's practical enjoyment of his houses, gardens, fields, and woods, without which the grant to him would have been illusory.

But for these authorities I should have thought that what was meant by "mines and minerals" in such a grant was a question of fact what these words meant in the vernacular of the mining world and commercial world and landowners at the end of the last century; upon which I am satisfied that no one at that time would have thought of classing clay of any kind as a mineral.

Solicitors: Messrs. BELL, BRODRICK, & GRAY; Mr. T. GILL.

McNISH v. STONE.

(Supreme Court of Pennsylvania. Oct. 6, 1879.)

[1]**An oil lease is to be construed** with reference to the known character of the oil business and the evident intention of the parties.

A covenant to commence operations within 6 months is not performed by commencing and then indefinitely suspending operations.

Sinking one well which is abandoned as dry followed by suspension of all work or possession for 12 years is a surrender of the lease.

[2]**An oil lease is a grant of the right to search** for oil and the second party does not become a tenant until oil is found. Although the right to search is incorporeal the lease is nevertheless a contract concerning lands and within the recording acts.

This was an action in ejectment by McNish and others against Stone and others, wherein a jury was dispensed with, and the cause submitted under Act April 22, 1874. Judgment for defendants. Plaintiffs bring error.

"Robertson, being the owner of certain land, demised the same to Haffey, on December 20, 1864, by a lease, of which the material parts were as follows: 'The said party of the first part, for the considerations expressed in the covenants and agreements hereinafter set forth, and mutually entered into, do lease unto the said party of the second part, his heirs and assigns, the exclusive right to bore or mine for Seneca oil or other minerals, on the following described land, etc. * * * Also the right to enter upon said premises and occupy the same, or so much thereof as may be necessary to prospect, bore, mine, or otherwise to search for, find, and procure Seneca oil or minerals, and as may be necessary for the erection of machinery, storehouses, vats, manufactories, or other needed buildings, and the right to construct necessary roads

[1] *Venture Oil Co.* v. *Fretts*, 17 M. R. 543 as a note to which case the text of McNish v. Stone was first officially printed.

[2] *Calhoun* v. *Neely*, 201 Pa. 97.
Aye v. *Philadelphia Co.* 193 Pa. 457.
Gill v. *Weston*, 110 Pa. 313; 1 Atl. 921.

to and from said buildings or premises, and the use thereof. Also the right to divide and subdivide into as many shares, parts, or subdivisions, either by undivided interests or by division and measurement on the ground, as the party of the second part may elect, and the same to sell, assign, or transfer at pleasure. To have and to hold the said rights and privileges hereunto granted, with the appurtenances, unto the said party of the second part, his heirs, executors, administrators, and assigns, for the full period of ninety-nine years from the date above written, for the purpose of procuring oil or minerals. Said party of the second part to have the privilege of removing any buildings, machinery, etc., which he may have erected. Said party to commence operations within six months from date, either on said lot or within half a mile of its boundaries. In consideration of the above, the said party of the second part agrees to render unto the party of the first part the one-tenth of all the oil or minerals procured from said premises.'

"The findings of facts by the court, (WILLIAMS, P. J.,) and the conclusions of law and judgment, were as follows:

"That Robertson, the owner of the land, made the foregoing lease, which was acknowledged and recorded. That on January 20, 1865, Haffey assigned the lease to the King Oil & Mineral Company, a New York corporation, with a nominal capital of $20,000, held in equal proportion by each of ten persons named in the articles of incorporation as trustees, of whom Haffey was one, he being also superintendent. That the company, through Haffey, on February 12, 1865, contracted with Francis and Franklin Dean for the boring of an oil well on the Shepherd farm (which was within one half mile of the land in controversy) to the depth of 1,000 feet. It was stipulated that on notice from the company that the hole is of sufficient depth (not less than 700 feet) to satisfy them that search is fruitless, the Deans should cease operations, and take pay for

the actual depth to which the well should then be sunk. That the Deans began the well within six months after the date of the lease, and continued operations until the fall of 1865, when they had reached a depth of 902 feet, when they were notified by Haffey for the company, and by another trustee and shareholder, that the hole was of sufficient depth to satisfy them that the search was fruitless, and they were directed to cease operations, which they accordingly did. That during the following spring the company sold its boiler, engine, and drilling tools, and they were taken away by the purchasers. The company also took down its engine house, and the branch from the derrick, and removed the lumber and materials from the premises, leaving only the derrick frame standing (which remained until it fell down from decay), and went wholly out of possession and occupancy of said Shepherd farm, and have remained out ever since, and abandoned the search for oil thereon. That the company has at no time commenced or prosecuted the work for boring for oil or other mineral within one half mile of the land in controversy, except in the single instance of the well put down on the Shepherd farm in 1865, and at no time has possession of the land in controversy been taken or have operations been commenced or prosecuted for oil or other minerals thereon. The plaintiffs claim under the company. Robertson sold the land to Stone, who had no actual knowledge of the lease of December 20, 1864. That the land has been shown by developments within the last two years to be valuable oil territory, and has a producing well upon it, put down by defendants. That there were no operations by any other parties in the neighborhood until the time when the plaintiffs made demand for entry upon the premises under their contract, and were refused by the defendants, and that at no time had the defendants called upon or required the plaintiffs to proceed. That the production of oil has a tendency to drain the territory, basin, or fountain, in which the wells are located. After a region is developed

as oil territory, therefore, the landowner and the lessee, who desires to secure the benefit of the oil under his land, must push his operations *pari passu* with those of adjoining owners; otherwise the value of his land and its capacity for producing oil will be steadily diminished by the operations around him.

"Conclusions of law: From a careful consideration of this case we have reached the following conclusions of law, which seem to us conclusively to dispose of the title upon which the plaintiffs rely: (1) The agreement of December 20, 1864, contemplates the production of oil, and the return to the lessor of rent or royalty out of the oil produced. It must, therefore, be construed with reference to the known character of the oil business, and the evident intention of the parties. (2) The covenant to 'commence operations within six months,' etc., is not performed by commencing and then indefinitely suspending operations; but operations begun within the time limited must be prosecuted in the manner in which the business is ordinarily conducted, and with ordinary diligence, until the 'search for oil is ended,' either by finding it and operating the territory, or failing to find it and surrendering the possession. (3) The operations begun on the Shepherd farm in February, 1865, suspended by the direction of the King Oil & Mineral Company, because of the declared conviction that the hole was sufficiently deep, and further search useless and never since resumed, (no entry having been made on the land in controversy, or search made thereon,) is not such performance of the contract on the part of the lessee as invests it with the right to the possession of this land for the full term of ninety-nine years. (4) Such suspension of operations, abandonment of the search, and relinquishment of the possession of the Shepherd farm, continued for over twelve years, (nothing more having been done under said contract meanwhile,) amount to a surrender of the rights acquired under the contract of December 20, 1864. (5) The contract of December, 1864, is peculiar, and one of those instruments to

which the development of the oil business has given rise. It is not a grant of land, or a present leasehold interest therein. It is not a grant of the mineral, etc., in place or under the land, but the 'right to search for oil,' etc., and the right to enter and occupy for the purpose of such search, and for no other. If the search is fruitless, it is at the cost of the explorer. When the search is abandoned, the right of entry is gone. But (6) if the search is successful, then the explorer becomes a tenant for the purpose of operating the land at the rent agreed, and his right of possession exists, not for the purpose of search, but for the purpose of operating the oil or minerals which his search has discovered. Whether the tenancy exists, depends, therefore, on whether the oil, which is its object, is found to exist upon the land. (7) That, notwithstanding the fact that the right or interest which passes under an agreement like the one under consideration is an incorporeal one, yet the agreement is a 'contract concerning lands,' which is within the recording acts.

"The defendants' second and third points, and answers of the court thereto, were as follows: Second point: 'Until entry made and expenditures of money in pursuance and on faith of the license, it was executory and revocable at the pleasure of the licensor, and a conveyance of the land by the licensor, and mining for oil by his grantee, would be a revocation.' Answer: 'We affirm the defendants' second point, with the qualification that expenditure of money in pursuance and on faith of the license is enough, without entry, to prevent revocation.' Third point: 'Until entry made and possession taken of some part of the land for mining purposes, the licensee had no such title as would support ejectment.' Answer: 'We cannot affirm defendants' third point. Entry and operations on other lands within the contract distance might support ejectment for this.'

"General finding: The finding of the court upon the whole case is in favor of the defendants.

"From the judgment in favor of the defendants plaintiffs took this writ, assigning for error, *inter alia*, the rulings contained in the 2d, 3d, 4th, 5th, and 6th paragraphs of conclusions of law. The names of the counsel have not reached us.

"Per Curiam. Filed October 6, 1879. We entirely concur in the conclusions of law of the learned judge below upon the facts as found by him and the judgment entered in favor of the defendants. *Judgment affirmed.*"

STREPEY ET AL. V. STARK ET AL.

(7 Colorado 614; 5 Pac. 111. Supreme Court. October 31, 1884.)

An amended location certificate filed after suit brought is admissible in evidence.

[1]**A location certificate is not title** nor proof of title, but contains a description of what ground is appropriated, becomes constructive notice of the locator's possession and is one of the steps necessary to make a perfect mining location.

There are four essentials to complete location: 1, the ten foot shaft; 2, the posted notice; 3, the surface staking and 4, the record of the location certificate.

[2]**Such location certificate is prima facie proof** of whatever the statute requires it to state but is not evidence of what is not required to set forth, e. g. the depth of the discovery shaft.

[3]**The relocation certificate relates back** and cures a void original certificate but will not in such case cut out an intervening valid location.

In ejectment between possessory claims each party must rely on the strength of his own title: defects in the paper title of the party in possession are not material until the other party proves a valid location.

To constitute a valid possession of a mining claim neither residence nor continuous occupation are essential.

Remarks of Court to jury exhorting to an agreement on a third trial of the case considered and upheld.

Appeal from District Court of Chaffee County.

[1]*Uinta Co.* v. *Creede Co.* 119 Fed. 164.

[2]*Cheesman* v. *Shreeve*, 17 M. R. 260.

[3]Relocation of abandoned ground does not relate back to or obtain any rights from the old location. *Cheesman* v. *Shreeve*, 17 M. R. 260.

An amended location relates back when the original record or location was only irregular and not void. *Moyle* v. *Bullene*, 7 Colo. App. 309; 44 Pac. 69. Instance of amendment upheld by relation to cure record otherwise void and cut out intervening claim. *Frisholm* v. *Fitzgerald*, 25 Colo. 290; 53 Pac. 1109. (This case has no binding authority, a majority of the Court not joining in it.)

The relocation cannot be permitted to cut out intervening overlaps. *Jordan* v. *Schuerman* (Ariz.), 53 Pac. 579.

The filing of an amended record is no proof that the original record was not valid. *Id.*

Amended location certificate relates back to original. Where one

HARTENSTEIN & SINDLINGER, for appellants.

RHETT & HOBSON, for appellees.

The facts are stated in the opinion.

STONE, J. This is a contest between two sets of claimants for the possession of a certain mining claim, which appellees claim as the "Little Bell" lode, and appellants as the "Negro" lode. Appellees—the plaintiffs below—alleged right of possession by virtue of discovery, prior possession, location, and compliance with the mining laws relating thereto. Appellants as defendants merely denied in their answer the several allegations of the plaintiffs' complaint. The ground of defense upon the trial was chiefly that appellees had failed to comply with the laws, in not doing sufficient work on the claim, previous to appellants' possession, to entitle them to hold it. Appellees established their discovery of mineral on the ground, as original locators, in June, 1879, and their witnesses testified that a discovery shaft was sunk that year to a depth of over 10 feet; that a location was made, in accordance with law, in July, and a certificate thereof filed in September of that year; that when they went to resume work on the mine the next year, appellants were in possession. The testimony of appellants was that they first came upon the ground in June, 1880, and found a small cut or excavation, not more than four or five feet deep, exposing a little mineral, and that the only stake they found was an old one at this excavation, containing the name of one of the appellees and the

holds in trust for co-tenants his amended record is for benefit of all. *Hallack* v. *Traber*, 23 Colo. 14.

When the ground has been held for the full period of the Statute of Limitations the location Certificate is evidence of regular location. *Harris* v. *Equator Co.*, 12 M. R. 178.

The same ruling where possession had been held for years and the property passed into parties strangers to the location. *Cheesman* v. *Hart*, 16 M. R. 263.

date, 1875; that they went to work in the same excavation, and sunk to the depth of about 15 feet, took out mineral, and located the claim by the name of the Negro lode, and filed location certificate in August following. The ground claimed by each side is shown to be, practically, if not identically, the same, and the appellants seem to have claimed and located, or rather, relocated, the mine, and asserted right thereto, on the ground that the discoverers and former occupants had failed to comply with the law in respect to the necessary work and staking, and had, therefore, either abandoned the claim or forfeited their right thereto, if they ever had acquired any right at all. The verdict and judgment below were in favor of the plaintiffs, upon the third trial of the case, and appellants seek to have the judgment reversed because the verdict, as they allege, is contrary to the weight of the evidence; that improper evidence was admitted on the trial; that proper instructions prayed were erroneously refused by the court; and that the jury were improperly influenced by remarks made by the judge, pending their deliberations, for the purpose of inducing them to agree upon a verdict.

Upon the matter of the admission of evidence which is assigned for error, the principal objection, as argued by counsel for appellants, appears to be made to the admission of appellees' amended certificate of location. Both parties had made and recorded amended location certificates. The original location certificate of appellees was filed for record September 20, 1879, and their amended certificate on June 16, 1881. The original certificate of appellants was filed August 30, 1880, and their amended certificate, September 26, 1881. The original and amended certificates of appellees were offered in evidence together, and over the objection of appellants were admitted, with the following remarks in the nature of instructions by the court to the jury, to wit:

"Upon a proper identification of the certificates they will be admitted in evidence, and the jury will be instructed that the first certificate is in

itself void, and it confers upon the plaintiffs no title; that if they find from the evidence that before the amended certificate was filed for record defendants aquired rights in the premises, or an interest in the premises, then they shall disregard the second certificate; but if they find that defendants acquired no such interest, then the second certificate will relate back under the law to the plaintiffs' (location,) and will confer upon plaintiffs the rights which would have been acquired had the first been a proper location certificate."

Before the close of the evidence on the behalf of appellees, the court ordered their original location certificates withdrawn, giving the reason therefor in the following words, to wit:

"On a little reflection,—I state this before plaintiffs close their case,—I have concluded that the amended location certificate performs all the offices that the original could, and therefore I am going to withdraw it from the jury, and leave the amended certificate before the jury with a proper instruction."

The original location certificate of appellants was also held void and excluded, while their amended certificate was admitted in evidence. The objection made by appellants to the admission in evidence of appellees' amended location certificate is put upon the ground that this certificate was not filed for record until after the commencement of the suit; and, in support of this objection, counsel invoke the rule that a plaintiff in ejectment must stand or fall on the right he had when he commenced his action, and cannot make or strengthen his case by any after-acquired right or title. The question here raised is one of importance in this class of cases, and one that, so far as we can ascertain, has not before been passed upon by any court of last resort; so that we are left to determine it without the aid of adjudged precedent, but we think the rule contended for by appellants' counsel, as above stated, is inapplicable to a case like this. The question rests chiefly, if not wholly, upon what we are to consider as the nature, purpose, and functions of such location certificate. Its objects and functions are peculiar; it differs from ordinary documentary muniments of title in that it is not a title nor proof

of title; nor does it constitute or of itself establish the possessory right in issue, and to which it relates. It is purely a creature of the statute, and, under the evident legislative intent, its purposes and functions are twofold: When duly recorded, it becomes notice to the world of the facts therein set forth, namely, a description of the premises claimed, and by whom and when located, in order to secure the discoverer or claimant against others seeking to locate the same ground—and is thus constructive notice of the claimants' possession. In addition to this purpose, which it is to serve, it would seem that by statute such certificate is made one of the steps requisite to constitute a perfected mining location.

Under the law, four certain things are to be done in order to perfect a location: *First*, the sinking of a discovery shaft upon the lode 10 feet in depth, or deeper if necessary, to disclose mineral in place; *second*, the posting of a notice at the place of discovery, giving the name of the lode, the name of the locator and the date of discovery; *third*, marking the surface boundaries of the claim by posts in the manner pointed out by statute; and, *fourth*, making and recording a location certificate containing the name and description of the lode, the name of the locator, and the date of the location. It will be noted that the statute does not require that the certificate shall contain a statement that the discovery shaft has been sunk the requisite depth, or so as to disclose mineral, nor that the discovery notice has been posted, or boundary stakes set, which things are made the chief requirements on the part of a locator in order "to locate his claim" before filing the location certificate; although it is usual to include such statement in the certificate, when the performance of such work—posting and staking—is a pre-existing fact. And it has been held by the United States Circuit Court of Colorado that, though the locator of a mining claim may not have sunk his shaft to the discovery of mineral in place prior to filing his location certificate, yet, if he shall thereafter so sink the shaft and disclose

the lode, he will hold, as against all who had not, theretofore, acquired an interest in the lode, the same as if he had uncovered it before the survey and filing the certificate, such discovery relating back to the location. *Zollars & H. C. C. M. Co.* v. *Evans*, 2 McCrary, 39; 5 Fed., 172.

Where the right of possession is founded upon an alleged compliance with the law relating to a valid location, all the necessary steps therefor, aside from the making and recording of the location certificate, must, when contested, be established by proof outside of such certificate; the record of the certificate being proof itself of its own performance as one of such steps, and, in regular order, the last step in perfecting the location; and the certificate, when recorded, is certainly competent evidence, *prima facie*, of all which the statute requires such certificate to contain, and which are therein sufficiently set forth. And even when the certificate, for any of the reasons set forth in the statute, is deemed "void," it has been held admissible in connection with a valid amended certificate correcting the defects of the original. *Van Zandt* v. *Argentine M. Co.*, 2 McCrary, 159; 8 Fed., 725.

In support of this holding two principal reasons may be mentioned: *First*, the original certificate showing the date of location and record, although fatally defective in matter of description or otherwise, may well be considered as an element tending to show good faith on the part of the locator in attempting to comply with the law in making his location; *second*, the introduction of such original, together with the amended, or, as it is termed in the statute, "additional certificate," may afford a means of comparison in respect to description and surface boundary of the premises located; whether the first is identical with that described in the additional certificate, or whether it embraces the precise ground, or any portion thereof, claimed by either of the contesting parties, otherwise than according to such original location.

The section of the statute under which the right to file an amended or additional location certificate is given, is as follows:

"If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing; or shall be desirous of changing his surface boundaries, or of taking in any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such locator, or his assigns, may file an additional certificate, subject to the provisions of this act: provided that such relocation does not interfere with the existing rights of others at the time of such relocation; and no such relocation or other record thereof shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under previous location."

The purpose of this additional certificate appears to be sufficiently expressed by the language of the act. It cannot create a right of possession or location in the premises claimed under the first location, which did not exist prior to the filing of such additional certificate; it can confer no additional right, and is therefore evidence of none, as against any intervening or pre-existing right of another. It follows that, except as against such intervening rights, an additional certificate serves the same purpose, in its admission as evidence, as that of an original location certificate, and will relate back to the first location. The evident intent of the statute is that the additional certificate shall operate to cure defects in the original, and thereby to put the locator, where no other rights have intervened, in the same position that he would have occupied if no such defect had occurred. Such intent is in accord with the principle of all curative provisions of law. Without such result this provision of the statute would be ineffectual to confer any additional or other benefit than the provisions of Section 2411, Gen. St., for an entire relocation of a mine as for an abandoned claim.

From the foregoing view of the purpose and functions of a location certificate, original and additional, it does not appear that the admissibility as evidence of such additional certificate is affected by the circumstance that it was filed subsequent to the commencement of the suit, since it is not evidence of any after-acquired right or interest, but merely evidence relating to a right of possession which must have been acquired prior to the filing of such certificate, and prior to the acquisition of any intervening right of the controverting party.

Counsel for appellants argue that it is illogical and erroneous to hold that the amended certificate can relate back to the original, if the original be void; for, if void, it is dead and the same as if it had never existed; but we are not so holding. What we say is, not that the second certificate relates to the first in the sense in which the term "relation" is employed to express a well-known legal doctrine, but that it relates back to a right of location accruing by virtue of the prerequisite acts of discovery, prior possession, excavation, posting, marking boundaries, and an attempted compliance with the law respecting the filing of a location certificate.

It is further to be observed that the rule in ejectment that the plaintiff must recover, if at all, on the strength of his own title, and not upon the weakness of that of his adversary, is held not to apply to possessory actions for mining claims, where neither party has, strictly speaking, any legal title, but when the prior possession of the plaintiff is pitted against the present possession of the defendant. "Practically, the real question involved in all such cases is, which, as against the other, has the better right to mine the land in question?" *Richardson* v. *McNulty*, 24 Cal. 339. Each party must prove his claim to the premises in dispute, and the better right must prevail. *Lebanon M. Co.* v. *Con. Rep. M. Co.* 6 Colo. 371; *Golden Fleece Co.* v. *Cable Co.* 12 Nev. 312.

The right to mineral lands, before a patent issues from the government, rests in possession of the claimant. To constitute such possession as will give this right under location statutes, neither residence on the premises nor continuous actual occupation, nor that kind of possession for which appellants' counsel contend, denominated *possessio pedis*, is required. *English* v. *Johnson*, 17 Cal., 108.

The right of possession is the sole issue in the case at bar. The appellees established their prior right by proof of discovery, prior possession, sinking a discovery shaft, disclosing mineral in place, posting the proper notice, marking the boundaries and attempting to complete the location by filing a location certificate. These acts were all done the year previous to the appellants' taking possession of the same premises and attempting its relocation under another name. The original location certificate of appellees was recorded September 20, 1879, and their amended certificate, June 16, 1881. The original certificate of appellants was recorded August 30, 1880, and their amended one, September 26, 1881. It will thus be seen that the appellees were prior in possession, and that their two location certificates were respectively prior to those of appellants. The original certificate of each party was held fatally defective, and the amended certificates of both parties were recorded subsequent to the commencement of the action. There was no error in receiving in evidence the original location certificate of appellees. If there was error in afterwards withdrawing it, of this the appellants cannot complain, since the only possible effect of such withdrawal was to the advantage of the complaining party and the prejudice of the other side. The error of the court, if in this case it was such, in rejecting the original certificate of appellants, was also without prejudice, for the reason that appellees, by proof of prior possession and location, having established their right of possession at the time of appellants' entry, such subsequent entry and relocation by appellants,

in the absence of abandonment, forfeiture, or otherwise intervening loss of right by appellees, conferred upon appellants no right as against appellees; and so their location certificates, being both subsequent, respectively, in time to the corresponding ones of appellees, related to no superior right, and hence, while admissible in evidence, counted for nothing in appellants' favor.

The appellees' priority of possession and seniority of location certificates are undisputed. The issue was the right of possession. Under this issue, the appellants, who by their answer simply denied this right in the appellees, contested the same on the ground of an alleged want of compliance with the law on the part of appellees in the amount of work done in sinking the discovery shaft, posting discovery notice, and in the necessary marking of the surface boundaries of the claim. If, then, the appellees established by the testimony their compliance with the law in respect to these points in dispute, their prior right of location and superior right of possession thereby followed, and so continued to exist unimpaired down to the time of trial in this case. It is therefore clear that neither the original nor amended certificate of appellants could avail for any purpose as evidence, unless the appellants first established a superior right of location; for, as we have before stated, a location certificate can confer no right of location of itself, and can relate only to a right of location acquired previous to its filing. We are not now contending against the admissibility of these certificates as evidence. We concede that the original, in connection with the amended one, might properly have gone to the jury; that in certain cases error might be well assigned upon the exclusion of such certificate; but we are here giving reasons for our holding that, if there was possible error in the rejection of the original certificate, in this instance it was error without prejudice to the party complaining, and therefore no sufficient cause for reversal. The instructions given by the

court correctly stated the law applicable to the facts in controversy, and covered all the points in issue in the case. There was, therefore, no error in not giving the instructions prayed by appellants, and which were refused by the court.

The testimony as to the amount of work done by appellees on the mine previous to the relocation by appellants is conflicting between the witnesses on one side and those upon the other; but as the jury were the sole judges of the credibility of the witnesses and the weight of testimony, we cannot say that the verdict was contrary to the weight of such testimony, and under the frequent decisions of this court there is no cause for reversal on this ground. The jury were warranted in finding upon the testimony, as they evidently did, that the right of possession was in appellees by reason of discovery, priority of possession, and a prior location, such as to give them the better right to the premises in controversy.

The remarks of the district judge to the jury when they were called in before the court, after being out for some time pending their deliberations upon their verdict, were, we think, not calculated to produce a hasty, indeliberate, or unfairly considered verdict. These remarks were of considerable length, and we do not consider it necessary to quote them in full; but, in substance, they reminded the jury of the disastrous effects to litigants and to the public of failures on the part of juries to agree upon verdicts at the end of protracted litigation; that this was the third trial of the case in hand; and that the efforts of the court would be to secure a verdict in this instance if within the bounds of possibility. To prevent any possible undue influence or misconception of the object of these remarks, the court added, in conclusion:

"These remarks, gentlemen, are not made for the purpose of influencing your judgment or biasing your minds. They are not made for the purpose of coercing you or influencing you, except so far as they impress on

your minds the importance of making every honest and conscientious endeavor possible to arrive at a verdict, and you are not to pay any attention to them, save as they may serve that purpose. I don't suppose there is a single man upon the jury who is acting in any other than a conscientious manner. I don't think there is a man among you who would do so under the oath you have taken, but it is possible that further consideration of the evidence and further discussion may lead you to arrive at a conscientious agreement. This is all I have to say. I am going to ask you to retire with the bailiff and further consider of your verdict."

While the judge is not warranted in saying anything to the jury to influence their decision, or indicate to them what their verdict should be, (except upon the hypotheses laid down in the written instructions submitted), or even to unduly hasten a verdict, we can see nothing in the remarks made to the jury here that could have operated viciously, and one must presume that the judge had some good reason for addressing them as he did, to impress the importance of arriving at an agreement upon a verdict, if possible, upon the third trial of the case.

The other assignments of error arising upon the evidence do not appear to be well taken, and are not of sufficient importance to call for discussion.

The judgment will be affirmed.

EZZARD ET AL. v. THE FINDLEY GOLD MINING COMPANY.

(74 Georgia 520; 58 Am. Rep. 445. Supreme Court. Feb. 24,1885.)

[1]**Ejectment does not lie for flooding lands** by a dam.

Action on the case, Defendant not withholding possession. The owner of land covered by water or the owner of the mineral interest may maintain such action but case for damage is the remedy where the defendant has done an injury to the land but is not in possession.

EJECTMENT. Before JUDGE BROWN, Lumpkin Superior Court, October Term, 1884.

The opinion states the case. Defendant had judgment below.

WM. EZZARD, *in propria persona*; HENRY B. TOMPKINS, for plaintiff in error.

W. P. PRICE; R. H. BAKER, for defendant.

HALL, Justice.

The question made in this case is, whether the lessor of the plaintiff, who has title to the gold and ore embedded in the land in question, with the right to enter thereon, and to the use of the water in the stream running through the premises, to enable him to mine the ore, can maintain ejectment against an adjacent proprietor lower down the stream, who has erected a dam across the same, by which the water is thrown back and submerges the land on which the mining right is situated, and by means of which the owner is prevented and

[1]See *Nichols* v. *Lewis*, 15 Conn. 137. The Note 58 Am. Rep. 447 cites several analogous, not flooding or mining cases.

"It is customary to make a dam whenever necessary. The rule all work by is, for each person to protect his own mine against others." *Jones* v. *Robertson*, 15 M. R. 703.

hindered from making use of his property? The court below was at first of opinion that the action was proper, and refused a motion to non-suit, but subsequently, when a verdict had been returned for the plaintiff with mesne profits, and a motion was made for a new trial, upon various grounds, including the refusal to award a non-suit, the verdict was set aside and a new trial was ordered. Exception was taken to this judgment, and the case is here upon that exception for review.

We are of opinion that the non-suit should have been awarded, and having refused it, and a verdict having been rendered for the plaintiff, the court was right to correct the error by setting it aside and ordering another hearing. If the rights of the plaintiff were invaded by covering the land with the water backed in consequence of the defendant's having erected his dam across the stream, and thus causing water to overflow the land in which the plaintiff had an interest, he was not without his remedy. In all cases of consequential damages or "such as do not follow immediately upon the act done," but "are the necessary and connected effect" of the same, "though to some extent depending upon other circumstances" (Code §3071), the party wronged has his remedy, and that remedy is an action on the case as contradistinguished from trespass. The cases and authorities showing the damages claimed here to be consequential, and declaring case the proper remedy to redress the injury, are collected and arranged in Angell on Water Courses, §§395, 396, 397, and 6 Waite's Act. and Def., 312, 313.

A resort to an action of ejectment to vindicate such a wrong would seem, to employ the quaint but expressive language of Lord Coke, "to be a mere stranger in the law." The only analogous case which gives countenance to such a proceeding is *Sherry* v. *Frecking*, 4 Duer's, R. 457, where it was held that the owner might recover in ejectment the space above his land, as when an adjoining building overhung it. This decision

was put upon the principle that the common law signification of land embraced all above and below it to an indefinite extent (a definition which has been carried into our Code, §2218). It misapplied, however, as we conceive, a correct principle, and was expressly overruled in a later case by the Supreme Court of New York, in which state it was rendered. (*Aiken* v. *Benedict*, 39 Barb. R., 400.) According to the justice who delivered the opinion in this case, this is the only instance which the books furnish where ejectment was sustained under like circumstances, either in England or the United States. It is further said: "The point appears by the report of the case to have been decided with little or no consideration, and without referring to a single authority to show that ejectment would lie. The court admit that the claim is a novel one, but remark that they do not see why it is not well founded, or why, if A builds over, though not upon, B's land, B may not have his remedy by ejectment." But the Supreme Court did not so see it, and held that such a projection over the land of another was not such an encroachment upon his possession as would sustain an action of ejectment. And Mr. Tyler (On Ejectment, p. 38) deems the latter decision "more in harmony with the general principles of the action to recover possession of realty than the former," and thinks it may be regarded as the better law. And such is our own opinion; indeed, we do not clearly see how the sheriff could execute the writ of *habere facias possessionem*, which the judgment in favor of the plaintiff in ejectment awards, by removing the water from the premises and by putting the plaintiff in possession. He cannot remove the defendant, for he has never been in possession, and by his plea disclaims any right thereto. Besides, although the plaintiff may recover the rents of the land along with the possession, and any damages done to his freehold in connection with its wrongful use, yet, apart from these rents, he can recover no damages disconnected from them. 19 Ga., 583.

To avoid misapprehension as to the extent of this decision, it may be well to state that we do not hold that the owner of land covered with water, or of the mineral interest in such land, when either is held adversely, may not maintain ejectment for the recovery thereof. This is not the case before us.

Judgment affirmed.

THE NATIONAL COPPER COMPANY v. THE MINNESOTA MINING COMPANY.

(57 Michigan 83; 23 N. W. 781; 58 Am. Rep. 333. Supreme Court June 3, 1885.)

Working to boundary. Each party has a right to mine on its own side to the boundary.

Breaking through into the adjoining mine is not necessarily a trespass unless the party in breaking has crossed beyond his line.

A trespassing party is not bound to close a hole made by him into the adjoining mine, but is responsible for the resulting damages.

[1]**Statute of limitations in cases of remote result.** When the wrong consisted in the original trespass, the breaking through the barrier, and the injury did not occur until years after by the abandonment of the mine and the over-flow of its water through the opening the statute of limitation begins to run from the date of the wrong, not the date of the injury.

Error to Ontonagon. (WILLIAMS, J.)

Trespass. Defendant brings error. Reversed.

T. L. CHADBOURNE, for appellant.

CHANDLER, GRANT & GRAY and G. V. N. LOTHROP, for appellee.

COOLEY, C. J. This is an action of trespass. The following is a statement of the case, as made for the plaintiff, for the argument in this court:

"The plaintiff and defendant are corporations, which for

[1]Compare *Noonan* v. *Pardee*, 200 Pa. 474. *Hall* v. *Duke of Norfolk*, L. R. 2 Ch. (1900) 493. *Backhouse* v. *Bonomi*, 13 M. R. 677. *Clegg* v. *Dearden*, 5 M. R. 88.

The statute of West Virginia requiring coal owner to leave barrier when he reaches to five feet of his boundary line is constitutional. *Mapel* v. *John*, 42 W. Va. 30; 24 S. E. 608.

twenty-five years and more have been engaged in copper mining in Ontonagon County. Their mines adjoin each other. Each owns the land in fee on which its mine is situated. The plaintiff, in carrying on its mining operations, left a wall of rock, from fifteen to eighteen feet thick, next to the boundary line of defendant's mine. This was left as a barrier and protection to its mine against water or other encroachments from the Minnesota. The Minnesota left no such barrier; it not only worked up to the boundary line, but broke through into defendant's mine. About the year 1866 the plaintiff, at about forty feet above its fourth level, and from twenty to twenty-five feet from the boundary line, drilled a hole, of the ordinary size, about one and one-half inches in diameter, and when the blast was fired it blew through into the opening which had been previously made by the defendant into the plaintiff's territory. The drill-hole was left through from two to two and one-half feet of solid rock. Capt. Chynoweth, then the agent of plaintiff, examined this hole and the surroundings, and immediately gave orders to cease work there. This was done as a further protection against the defendant. No work has done at this point after that until the winter of 1883–4. The plaintiff had no knowledge of any further trespass at this point until February, 1884, under the circumstances related hereafter. The pump of the defendant was stopped in 1870, and that of the plaintiff in 1871 or 1872. Plaintiff's mine filled up to the adit level in about five years. Since 1870 the defendant has worked its mine more or less upon tribute, and so did the plaintiff, until May, 1880, when it resumed work. In order to avoid liability for the trespass committed by it at the plaintiff's fourth level (being the defendant's fifth level), the defendant sought to show, and did show, another hole at the first level, between the two mines. A continuation of the inquiry showed that this hole also was about twenty feet from the boundary line, on the plaintiff's side, and that defendant had here trespassed twenty feet upon

plaintiff's land. We do not think that the history of mining upon Lake Superior will disclose another instance of such reckless disregard of the rights of an adjoining mine-owner. This encroachment and trespass by the defendant at the defendant's fifth level occurred about the year 1859.

In May, 1880, the plaintiff resumed mining operations and commenced to pump the water from its mine. The six-inch pump, formerly used by the mine, and which had always been adequate to keep the mine unwatered, proved wholly inadequate, and it was compelled to get a twelve-inch pump, and even this was not sufficient in the spring; and in 1882 the water gained on them one hundred and twenty feet, and in 1883, two hundred and twenty-two feet, with the pump working night and day. Capt. Parnell, the agent of the plaintiff's mine, was thoroughly acquainted with it, having worked in the mine years before; he soon became convinced that the bulk of the water came from the defendant's mine. He found that the water came from the fourth level. He cleaned out the level, and, on reaching the point where the drill-hole had been made years before, he found that the rock had been all blasted away from the Minnesota side, and that the water was rushing through an opening from twenty to twenty-five feet high and twelve feet wide. When discovered there was a volume of water seven feet wide flowing from the Minnesota into the National. When the defendant made its second encroachment at this point does not clearly appear; according to the defendant's witness Spargo it was in 1871 or 1872. This witness was an employee of the defendant, and one of its tributors. He says he saw the hole from the Minnesota side, and it was then six to eight feet high, and from four to five feet wide. William George, a witness for defendant, last saw the hole in 1870 or 1871. It was then about a foot in diameter. The witness was then working for the defendant as tributor and captain. Thomas James was in charge of the mine. He admits that the defendant's tributors were then mining there.

This same Capt. James has been in charge of the defendant's mine as agent ever since.

It was not denied in the court below, and we presume will not be in this court, that the defendant committed these several acts of trespass. But, in proof of the fact, we refer to the admission of the agent Harris, the evidence that the track of a tramroad, sollars, and a system of timbering were found constructed from the fifth level of defendant's mine into this opening, and the testimony of plaintiffs' witnesses already referred to. Furthermore, it is beyond dispute that the defendant *knowingly* and *willfully* committed these acts of trespass, and broke down the barrier which the plaintiff had so carefully left to protect its mine for all future time, and against all possible dangers.

About 1870 the defendant concluded to abandon regular mining, stopped its pumps, and commenced what is known among miners as robbing the mine. It placed its tributors at work at the bottom of the mine, took out all the copper ground that could be found, took out the supports of the roof of the mine, and allowed it to settle or cave in. This was all done under the direction of the defendant's agent, James. The defendant's mine is situated upon a hill or mountain side. The result was that the surface of the ground became depressed, and openings were made in it. Defendant's agent James, testified to openings of this character on the surface of the Minnesota, amounting in all to over five hundred feet in length; some were three or four feet wide. Into these openings the water from rains and melting snow ran into the defendant's mine, and from thence flowed into the plaintiff's mine, through the opening at its fourth level. But for these openings the water would have run down the hillside. As one of defendant's own witnesses expressed it. 'There has been a general falling away of the bluff.' There were no such openings on the surface of the National. In fact, we everywhere find the plaintiff conducting its mining operations with due regard to the rights of adjoining owners; while we find the

defendant conducting its operations in the most reckless disregard of such rights."

The above is a sufficient statement of the facts for a discussion of the principal question in the case, viz.: Is the plaintiff's right of action barred by the statute of limitations?

The count in the declaration on which the parties went to trial alleged that the defendant, on March 15, 1882, and on divers days and times between that day and the commencement of suit, with force and arms broke down the partition wall between the mine of the plaintiff and the mine of the defendant, and let the water from its said mine into the mine of the plaintiff, and then and there filled the mine of the plaintiff with water, greatly damaging its timbering, workings, walls and machinery, hindered and prevented the plaintiff from carrying on and transacting its lawful and necessary affairs and business, caused the plaintiff great damage and expense in removing water from its mine, etc.

The defendant pleaded the general issue, with notice that the statute of limitations would be relied upon. The plaintiff recovered a large judgment.

I. The time limited for the commencement of suit for trespass upon lands in this state is two years from the time the right of action accrues. How. Stat., Sec. 8714. This action was commenced in May, 1884, and it is not claimed that damages for the original trespass can be recovered in it. The contention of the plaintiff may be succinctly stated as follows:

1. Had the plaintiff instituted suit within two years from the original trespass, the recovery would have been limited to such damages as were the direct and immediate result of the trespass. The subsequent flowage of water through the opening was not the direct, immediate, or necessary result of breaking down the barriers; therefore no damages could have been recovered therefor in an action so brought.

2. Two trespasses may be the result of one act. In other words, one trespass may cause another, and he who commits

the wrongful act in such a case will be responsible for both trespasses.

3. In this case no action accrued for the flowage of water into the plaintiff's mine until the flowage actually took place, but when the flowage occurred as a result of defendant's wrongful act it was a trespass, and if it continued from day to day there was a continuous trespass for which repeated actions might be maintained.

Upon these positions the plaintiff plants its case, and unless they are sound in law the recovery cannot be supported. All right of recovery for the original trespass, which consisted in breaking through into the plaintiff's mine, was long since barred, and it is not claimed that there was, from the time of the first wrong, a continuous trespass which can give a right of action now. The merely leaving an opening between the two mines is not the wrong for which suit is brought, but it is the flowing of water through the opening which is complained of as a new trespass; the original wrongful act of the defendant in breaking through being the cause, and the injurious consequence when it happened, connecting itself with the cause to complete the right of action.

In support of its contention that the case before us may be regarded as one of continuous trespass from the first, several authorities are cited for the plaintiff, which may be briefly noticed. Among them is *Holmes* v. *Wilson*, 10 Ad. & El., 503. It appeared in that case that a turnpike company had built buttresses on the plaintiffs' land for the support of its road. The act was a trespass, and the plaintiff recovered damages therefor; but this, it was held, did not preclude its maintaining a subsequent action for the continuance of the buttresses where they had been wrongfully placed. The ground of the decision was that in the first suit damages could be recovered only for the continuance of the trespass to the time of its institution. There could be no legal presumption

that the turnpike company would persist in its wrongful conduct, and, consequently, prospective damages, which would only be recoverable on the ground of such persistent wrongdoing, would not have been within the compass of the first recovery. The cases of *Bowyer* v. *Cook*, 4 C. B., 236; *Thompson* v. *Gibson*, 7 M. & W., 456; *Russell* v. *Brown*, 63 Me., 203, and *Powers* v. *Council Bluffs*, 45 Ia., 652, are all decided upon the same principle *Cumberland, &c., Co.* v. *Hitchings*, 65 Me., 140, was one of the wrongful filling up of a canal by a trespasser. It was held that the trespasser was under legal obligation to remove what he had unlawfully placed on the plaintiff's premises, and that, so long as he suffered the obstruction to remain, he was guilty of a continuous trespass from day to day. In *Adams* v. *Railroad Co.*, 18 Minn., 260, and *Troy* v. *Railroad Co.*, 23 N. H., 83, railroad companies which, by trespass, had entered upon the lands of individuals and constructed and begun the operation of railroads, were held liable as trespassers from day to day so long as the operation of the road was continued. The principle of decision in all these cases is clear and not open to question. In each of them there was an original wrong, but there was also a persistency in the wrong from day to day; the plaintiff's possession was continually invaded, and his right to the exclusive occupation and enjoyment of his freehold continually encroached upon and limited. Each day, therefore, the plaintiff suffered a new wrong, but no single suit could be made to embrace prospective damages, for the reason that future persistency in the wrong could not legally be assumed.

To make these cases applicable, it is necessary that it should appear that the action of the defendant has been continuously wrongful from the first. Whether it can be so regarded will be considered further on. The plaintiff, however, does not, as we have seen, rely exclusively upon this view. Its case is likened by a counsel to that of a farmer, whose fences are thrown down by a trespasser; the cattle of the trespasser on

a subsequent day entering through the opening. In such a case it is said there are two trespasses; the one consisting in the throwing down the fences, and the other in the entry of the cattle; and the right of action for the latter would accrue at the time the entry was actually made. The plaintiff also cites and relies upon a number of cases in which the act of the party which furnishes the ground of complaint antedates the injurious consequence, as the original trespass in this case antedated the flowing from which the plaintiff has suffered damage.

One of these cases is *Bank of Hartford County* v. *Waterman*, 26 Conn., 324. In that case action was brought against a sheriff for a false return to a writ of attachment. The falsity consisted in a misdescription of the land attached. When suit was brought, the period of limitation, if it was to be computed from the time the return was made, had already run; but under the statute the plaintiff was entitled to bring suit only after he had taken out execution and had a return made upon it, which would show a necessity for a resort to the attached lands. It was only after such a return of execution that the plaintiff would suffer even nominal damage from the official misfeasance; and it was therefore a necessary consequence that the time of limitation must be computed from that time, and not from the time of the false return.

Another case is that of *McGuire* v. *Grant*, 25 N. J. L. 356, which is to be referred to the same principle. The defendant removed the lateral support to the plaintiff's land by an excavation, made within his own boundaries. Injury subsequently resulted to the plaintiff in consequence. The statute of limitations was held to run from the time the damage occurred; the excavation not being of itself a tort until damage resulted. The case of *Bonomi* v. *Backhouse*, El. Bl. & El., 622, was like the last in principle, and was decided in the same way.

The plaintiff also, in this connection likens its case to that of one who, in consequence of a ditch dug upon his neighbor's

land, has water collected and thrown upon his premises to his injury. It is not the act of digging the ditch that set the time of limitation to running in such a case, but it is the happening of the injurious consequence.

The case supposed, however, is not a case of trespass. The act of digging the ditch was not in itself a wrongful act. The owner of land is at liberty to dig as many ditches as he pleases on his own land, and he becomes a wrong-doer only when, by means of them, he causes injury to another. If he floods his neighbor's land the case is one of nuisance, and every successive instance of flooding is a new injury. But here, as in the case of a continuous trespass, prospective damages cannot be taken into account, because it must be presumed that wrongful conduct will be abandoned rather than persisted in, and that the party will either fill up his ditches or in some proper way guard against the recurrence of injury *Battishill* v. *Reed*, 18 C. B., 696. Cases of flooding lands by dams or other obstructions to running water are cases of this description. *Baldwin* v. *Calkins*, 10 Wend., 169; *Mersereau* v. *Pearsall*, 19 N. Y., 108; *Plate* v. *Railroad Co.*, 37 N. Y., 472. So are cases of diverting water, to the flow of which upon his premises the plaintiff is entitled. *Langford* v. *Owsley*, 2 Bibb, 215. So are cases of the wrongful occupation of a public street, whereby the access of the plaintiff to his premises is obstructed. *Carl* v. *Railroad Co.*, 46 Wis., 625. Other cases cited for the plaintiff, and resting on the same principle, are *Thayer* v. *Brooks*, 17 Ohio, 489; *Blunt* v. *McCormick*, 3 Den., 283; *Winchester* v. *Stevens Point*, 58 Wis., 350; *Union Trust Co.* v. *Cuppy*, 26 Kans., 754; *Spilman* v. *Roanoke Nav. Co.*, 74 N. C., 675; *Loweth* v. *Smith*, 12 M. & W. 582. The case of *Whitehouse* v. *Fellowes*, 10 C. B. (N. S.), 765, was one of nuisance. A turnpike company made a covered drain with gratings at intervals and catchpits. In consequence of the insufficiency of the catchpits, or of their not being kept in proper condition, the plaintiff's colliery was flooded every

time there was a heavy shower. In an action for this flooding it was held that every damage was a new injury and gave a new right of action. The ruling sustained the position taken for the plaintiff in the case, which was thus succinctly stated by counsel arguendo: "The distinction which pervades the cases is this: Where the plaintiff complains of a trespass, the statute runs from the time when the act of trespass was committed, except in the case of a continuing trespass. But where the cause of action is not in itself a trespass, as an act done upon a man's own land, and the cause of action is the consequential injury to the plaintiff, there the period of limitation runs from the time the damage is sustained."

The case before us was one of admitted trespass, from which immediate damage resulted. Had suit been brought at that time, all the natural and probable damage to result from the wrongful act would have been taken into account and the plaintiff would have recovered for it. But there was no continuous trespass from that time on. The defendant had built no structure on the plaintiff's premises, was occupying no part of them with anything it had placed there, and was in no way interrupting the plaintiff's occupation or enjoyment. All it had left there was a hole in the wall. But there is no analogy between leaving a hole in a wall on another's premises and leaving houses or other obstructions there to encumber or hinder his occupation; the physical hindrances are a continuance of the original wrongful force, but the hole is only the consequence of a wrongful force which ceased to operate the moment it was made.

If, therefore, the plaintiff had brought suit more than two years after the original trespass, and before the flooding of its mine by water flowing through the opening had begun, and if the statute of limitations had been pleaded, there could have been no recovery. The action for the original wrong would then have been barred, and there had been no repetition of the injury in the mean time to give a new cause of action. The

mere continuance of the opening in the wall could not be a continuous damage. *Lloyd* v. *Wigney*, 6 Bing., 489. The right of action, if any, for which the plaintiff can complain, must therefore arise from the flowing itself as a wrongful act; there being no longer any action for the original breaking, and no continuous acts of wrong from that time until the flowing began.

The flowage caused a damage to the plaintiff; but damage alone does not give a right of action; there must be a concurrence of wrong and damage. The wrong, then, must be found in leaving the opening unclosed and permitting the water to flow through. It must therefore rest upon an obligation on the part of the defendant either to close the opening, because persons for whose acts it was responsible had made it, or to restrain water which had collected on its own premises from flowing upon the premises of the plaintiff to its injury. The latter seems to be the ground upon which the plaintiff chiefly relies for recovery.

In the argument made for the plaintiff in this court stress is laid upon the fact that the damage which has actually resulted from the flooding could not have been anticipated at the time of the original trespass, and therefore could not then have been recovered for. This consideration, it is urged, ought to be decisive. But, while we agree that it is to be considered in the case for what it is worth, it is by no means necessarily conclusive. The plaintiff must fix some distinct wrong upon the defendant within the period of statutory limitation, or the action must fail; and there is no such wrong in this case unless the failure to prevent the flowing constitutes one. The original act of wrong is no more in question now, after having been barred by the statute, than it would have been if damages had been recovered or settled for amicably; nor do we see that it can be important in a case like the present, where the wrong must be found in the injurious flowing, whether there was or was not a wrong originally. If there was, it

stands altogether apart from the wrong now sued for, with an interval between them when no legal wrong could have been complained of.

The mere fact that an opening was made by the defendant between the two mines, would not of itself have been a trespass unless the defendant invaded the plaintiff's premises in making it. Each party had a right to mine on its own side to the boundary. *Wilson* v. *Waddell*, L. R. 2 App. Cas., 95. And if the plaintiff had first done so, the defendant might have done the same at the same point, and in that way have made an opening rightfully. The difference between the case supposed and this is, that here the defendant was found to have gone beyond the boundary and committed a trespass. But suppose the defendant had then made compensation for the trespass, so far as it was then damaging, how would the case have differed from the present? The opening would remain, made by the defendant, through which, if the water was allowed to collect in his mine, it must eventually pass; and if he was under obligation to keep it within the bounds of his own premises, he would be liable for allowing it to pass; otherwise not. The fact that compensation was not actually made for the breaking away of the plaintiff's barrier, is immaterial when the statute has run, as has been already explained.

The case of *Clegg* v. *Dearden*, 12 Q. B., 576, is not unlike in its facts the case before us. In that case, also, there had been a wrongful breaking through from one mine to another, and an injurious flowage of water through the opening. The facts were found by special verdict, and Lord Denman, in pronouncing judgment, said: "The gist of the action, as stated in the declaration, is the keeping open and unfilled-up an aperture and excavation made by the defendant into the plaintiff's mine. By the custom the defendant was entitled to excavate up to the boundary of his mine without leaving any barrier; and the cause of action, therefore, is the not filling up the excavation made by him on the plaintiff's side of the

boundary and within their mine. It is not, as in the case of *Holmes* v. *Wilson*, 10 Ad. & El., 503, a continuing of something wrongfully placed by the defendant upon the premises of the plaintiffs; nor is it a continuing of something placed upon the land of a third person to the nuisance of the plaintiffs, as in the case of *Thompson* v. *Gibson*, 7 M. & W., 456. There is a legal obligation to discontinue a trespass or remove a nuisance; but no such obligation upon a trespasser to replace what he has pulled down or destroyed upon the land of another, though he is liable in an action of trespass to compensate in damages for the loss sustained. The defendant having made an excavation and aperture in the plaintiff's land was liable to an action of trespass; but no cause of action arises from his omitting to re-enter the plaintiff's land and fill up the excavation; such an omission is neither a continuation of a trespass nor of a nuisance; nor is it the breach of any legal duty. It was, however, contended on the part of the plaintiffs, that admitting this to be so, there nevertheless was a legal obligation or duty upon the defendant to take means to prevent the water from flowing from his mine into that of the plaintiffs through the aperture he had made"; but "the plaintiffs have not alleged any such duty or obligation in their declaration, nor is their action founded upon a breach of any such duty, if it exists, but upon the omission to fill up the aperture made by them in the plaintiff's mine. It appears to us that the defendant, upon the facts found by the jury, is entitled to have the verdict entered for him upon the plea of not guilty."

If this case was rightly decided, it should rule the one before us. It has been followed by the Supreme Court of Ohio in *Williams* v. *Pomeroy Coal Co.*, 37 Ohio St., 583, in a case which also closely resembles this upon its facts, and is not distinguishable in principle.

It seems to us that these cases are sound in law as well as conclusive. The only wrongful act with which the defendant is chargeable, was committed so long before the bringing of

suit that action for it was barred. Had suit been brought in due time, recovery might have been had for all damages which could then have been anticipated as the natural and probable result of the wrongful act. If the particular damages which have been suffered could not then have been anticipated, it is because it could not then be known that the defendant would cease mining operations and the plaintiff would not. There could be no flowing from one mine into the other while both were worked; and had the plaintiff ceased operations and the defendant continued to work, the defendant would have suffered the damage instead of the plaintiff. But neither party was under obligation to keep its mine pumped out for the benefit of its neighbor. Either was at liberty to discontinue its operations and abandon its mine whenever its interest should seem to require it. And had the plaintiff brought an action within two years from the time of the trespass, its recovery would necessarily have been had with this undoubted right of abandonment in view. But a jury could not have awarded damages for any exercise of a right, and they could not, therefore, have given damages for a possible injury to flow from such an abandonment. This is on the plain principle that the mere exercise of a right cannot be a legal wrong to another, and if damage shall happen, it is *damnum absque injuria.*

This view of the case is conclusive; but there is another that is equally so. The wrong to the plaintiff consisted in breaking down the wall which had been left by it in its operations. If any damage might possibly result from this which was not then so far probable that a jury could have taken it into account in awarding damages, the plaintiff was not without redress. It would have been entitled in a suit then brought to recover the cost of restoring the barrier which had been taken away; and if it had done so, and made the restoration, the damage now complained of could not have happened. It thus appears that complete redress could have been had in a suit brought at that time; and, that being the case, the

plaintiff is not entitled to recover now for an injury for which an award of means of prevention was within the right of action which was suffered to become barred. The right which then existed, being a right to recover for all the injury which had then been suffered, including the loss of the dividing barrier, it would not have been competent for the plaintiff, had suit then been brought, to leave the loss of the barrier out of account, awaiting possible special damages to flow therefrom as a ground for a new suit. The wrong which had then been committed was indivisible; and the bar of the statute must be as broad as the remedy was which it extinguishes.

The judgment must be set aside and a new trial ordered.

The other justices concurred.

[1] DUGGAN ET AL. V. DAVEY ET AL.

(4 Dakota 110; 26 N. W. 887. Supreme Court. Feb. 9, 1886.)

Burden of proof on apex claimant. One holding a patent of the United States for a mining claim is entitled to challenge the right of any intruder within the lines of his claim, and to require him to justify such intrusion by proof of his proprietorship of a vein having its top or apex in another claim, the pursuit of which in its downward course has brought him within the lines of the claim in controversy.

The law of the apex is purely statutory and gives to the apex claimant a right unknown to the common law.

The presumption of ownership is that the locator or patentee holds everything within his vertical lines until a preponderance of evidence shows an exterior apex under conditions allowing it to invade the ground between such vertical lines.

The right to order an inspection of the mining premises in controversy is within the powers of a court of equity without the aid of a statute.

Lode defined. Citation of the various definitions used in determining what is meant by the term lode in the Mining Act.

The law intended that end lines should be laid at substantially right angles to the strike of the vein.

An outcrop of a vein on a hill side dipping at an angle of 8 degrees is an "exposure of the edge of the vein on the line of its dip" and is not an apex as intended by the Mining Act such as to allow the owner of a claim located on such outcrop to follow the vein on its dip.

On appeal from First judicial district, Lawrence county.

The facts are stated in the opinion.

[1]For maps showing the vein and ground in controversy see 1 Lindley, pp. 395–399 and 2 Snyder on Mines, p. 779.

Except the case of *Gilpin* v. *Sierra Nevada Co.* 17 M. R. 310. the text case is the only reported decision where apex rights were given or denied upon a vein having upon the facts as stated in the reports a very slight departure from the horizontal. It is reviewed at length by both Lindley and Snyder in the context of the plats above referred to.

Blanket veins are patentable under the Lode Sections of the Mining Act. *Iron Co.* v. *Mike & S. Co.* 17 M. R. 436.

VAN CISE & WILSON and A. D. THOMAS, for plaintiffs.

MCLAUGHLIN & STEELE, for defendants.

CHURCH, J. This was an action in equity, brought by the plaintiffs, as owners of the Silver Terra mine, to restrain the defendants from prosecuting certain mining operations, by which it was alleged they had already approached, and were threatening and intending to enter within, the lines of the plaintiffs' claim, and remove certain valuable bodies or deposits of silver ore therefrom. The complaint alleged ownership by the plaintiffs in fee of the Silver Terra mine, (mineral claim lot No. 364,) and described the same by metes and bounds. It also stated sufficient grounds for equitable relief by way of injunction, and prayed (1) for the usual injunction, *pendente lite;* (2) for perpetual injunction at the final hearing; (3) for general relief. A preliminary injunction was granted, and, upon a motion to dissolve, was continued in force.

The answer of the defendants, after denying "each and every allegation of the complaint, except as hereinafter specifically admitted," proceeded to allege with great particularity of detail their ownership and possession of a certain quartz mining claim known as the "Sitting Bull" lode, with all veins, lodes, or ledges of valuable mineral bearing rock in place, throughout their entire depth, having their top or apex within the exterior surface boundaries of said Sitting Bull lode or mining location, under a location made by Donegan and Cochran, grantors of defendants, September 26, 1876; a relocation by Donegan and Cochran, March 16, 1877; an entry for patent by John H. Davey, January 8, 1883; and continuous and uninterrupted possession by defendants and their grantors. The answer further alleged that the discovery on the Sitting Bull lode was made on a vein, lode, or ledge of rock in place, bearing silver; that the top or apex thereof

was within the surface lines of said claim, extended downward vertically; that said claim was located along the said vein or lode; that defendants, in working and developing the same, had followed it for a distance of about 600 feet from the top or apex thereof, on a departure from the perpendicular, through and beyond the vertical southerly side line of the Sitting Bull claim, and in so working, developing, and following the same had reached a point on said vein or lode where the same reached or passed through and beyond the vertical northerly side line of the Silver Terra claim; that throughout its entire course, as so worked, developed, and followed by them, the ore body contained in said vein was continuous, without break or interruption, and that the vein, lode, or ledge bearing silver, upon which they (the defendants) were working, as alleged in the complaint, and which is claimed to be the property of the plaintiffs by virtue of their Silver Terra mining claim, is the same vein, lode, or ledge so discovered, worked, developed, and followed by the defendants in and from their said Sitting Bull location; that said vein at the point where they were working the same, as alleged in the complaint, lies between vertical planes drawn downward through the end lines of said Sitting Bull location, continued in their own direction; that the defendants are the owners of said vein, in possession and entitled to the possession thereof at said point, and at all points within the Silver Terra claim; that they have the right to follow the same so long as it shall continue to be continuous, and to depart from the perpendicular, and that as such owners they are following the same, and claim the right to do so, within the vertical side lines of the Silver Terra claim, and through and across the same; and that plaintiffs have no right, title, or interest in or to said vein or any portion thereof, by virtue of their ownership of the Silver Terra claim.

At the time the complaint was filed plaintiffs had entered the Silver Terra for patent. Subsequently a patent was

issued to them therefor, and thereafter, by leave of the court, they filed a supplemental complaint, alleging—*First.* The issue of said patent, and that it was based upon a location made by Daniel Egan, April 1, 1881, and claiming relation of title and possession to that date. *Second.* Alleging that defendants were prosecuting their workings under a claim of right so to do as the proprietors of a vein having its top or apex within the Sitting Bull claim, and that said claim and pretense were false, fictitious, and fraudulent, and defendants without right to enter and commit the acts complained of, and that plaintiffs were ignorant of this claim at the time their original complaint was made. Wherefore they prayed that the defendants might be restrained from setting up or asserting any right, title, or interest in or to their said mining ground, or the ores, metals, or minerals contained therein, on account of said alleged vein in said Sitting Bull claim.

For answer to this supplemental complaint the defendants, among other things, denied any knowledge or information as to the issuing of the patent to the plaintiffs; denied that said patent was based upon a location made by Egan, April 1, 1881, or any other time; and alleged that Egan never, at any time, made any valid location of said Silver Terra claim, or any discovery thereon of any vein of quartz or other rock in place, containing valuable mineral; and that the pretenses of Egan and the plaintiffs in this behalf are fraudulent and unfounded. They further reassert, but in more general terms than in their previous answer, their right to prosecute the work of extracting and mining the ore complained of by plaintiffs by virtue of their proprietorship of a vein having its top or apex outside of the lines of that claim, and extending thence on a departure from the perpendicular, in its downward course, to the place where they were working, within the vertical boundaries of the Silver Terra. This answer also avers that the plaintiffs have no right, title, or interest in said vein, lode, or ledge by patent from the United States, or otherwise,

nor any right to the ores contained therein; and prays that it may be adjudged that the defendants are the proprietors of the vein upon which they were working at the commencement of the action herein, and that plaintiffs have no estate, right, title, or interest in or to the same.

The issues presented by these pleadings were tried by the court, without a jury. Fifty-six working days were occupied in the trial, during the course of which 35 witnesses were examined for the plaintiffs and 60 for the defendants, the testimony altogether covering some 7,000 pages. Once during the progress of the trial, and again after the testimony was closed, the presiding judge visited and made a thorough inspection and examination of the premises in controversy, in company with a representative selected by each party. Subsequently the court filed its findings of fact and conclusions of law, adjudging the plaintiffs entitled to the relief demanded, and a final decree was entered in accordance therewith. A motion for a new trial was made and denied, and an appeal was therefrom taken to this court. The record shows 100 assignments of error, which it will be impossible for us to consider in detail. We shall notice only some of the more important involved in the appeal.

Several of these assignments relate to the admission or exclusion of evidence concerning the location of the Silver Terra mining claim. So far as these alleged errors involve, or are involved in, the question of priority in point of time of such rights as were acquired by the plaintiffs and defendants, under or by virtue of their respective locations, and the subsequent entry thereof, they would seem to have been disposed of by the findings of the court which awarded such priority to the Sitting Bull location, and the rights acquired thereunder. So far as such alleged errors have been urged as affecting the validity of the Silver Terra claim, they are disposed of by the entry and patent of that claim to the plaintiffs, as will hereafter appear.

Another class of these assignments relates to the alleged errors in the findings of fact. Concerning these it is only necessary for us to repeat the rule, so well settled in this court that when there is a substantial conflict in the testimony, the findings of the trial court will not be disturbed. What was said by the court in *Caulfield* v. *Bogle*, 2 Dak. 466; S. C. 11 N. W. Rep. 511, is especially applicable to this case, in which nearly 100 witnesses were examined, and where the trial judge had the advantage of a personal examination of the ground in controversy.

Another ground of error assigned is in the refusal of the court to grant the defendants' motion for a non-suit at the close of the plaintiffs' case. A reference to the complaint and supplemental complaint, as above set forth, will show that the principal averments upon which the plaintiffs' case was founded were (1) title to the premises in controversy in fee, by patent from the United States; (2) a threatened trespass by the defendants of a character irremediable at law; (3) a claim of right by the defendants to do the acts complained of.

Primarily, of course, it must be conceded that the burden would be upon the plaintiffs to establish the truth of all these averments. As a matter of fact the only evidence offered by the plaintiffs in their principal case in support of their first averment was the patent of the United States, granting to them in the usual form the Silver Terra lode claim, with some other evidence, not necessary to be considered here, as to the date of the location upon which the entry and patent were based; while to sustain the other averments they relied upon alleged admissions in the answers.

The motion to nonsuit was based upon the contention (1) that a patent for a quartz mining claim affords no evidence of title to any ore body except such as may be shown to belong to a vein, lode, or ledge upon which a valid discovery and location have been made, which discovery and location have,

in due course of compliance with the laws regulating the disposal of the mineral lands by the United States, ripened into the Patent, and to such other veins as may be found to have their tops or apexes within the lines of the patented claim; and that, on the other hand, there is an express reservation and exception out of the grant contained in such patents of the right of the proprietor of any other vein or lode having its top or apex outside the exterior limits of the claim patented to enter the same (the surface excepted) for the purpose of extracting and mining the ore from such vein, etc.; (2) that the answers contain no admissions of which the plaintiffs were entitled to avail themselves sufficient to support the second and third averments as above set forth.

The first point involves a construction of some of the leading provisions of the Revised Statutes of the United States relating to the occupation and purchase of the public mineral lands, especially section 2322, which is as follows: "The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge situated on the public domain, their heirs and assigns * * so long as they comply with the laws of the United States, and with the state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, or ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or lodes shall be confined to such portions thereof as lie between vertical planes drawn downwards, as above described, through the

end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges; and nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

It will be observed that there is no controversy respecting the surface of the Silver Terra claim; of that the plaintiffs are in unquestionable possession, and it is unquestionably embraced within their patent. The ore body in controversy is some hundreds of feet below the surface, and has been reached by a tunnel upwards of 600 feet long. Nor are they asserting a right to anything beyond or outside of that segment of the earth which would be included within planes extended vertically downward through the lines of their claim. They are merely resisting an encroachment upon mineral deposits within that segment. Let us consider, therefore, the nature and incidents of the title acquired by possession, location, and patent of mineral lands.

The common-law rule is familiar. The ownership and possession of the soil extended to the center of the earth, and *usque ad cœlum*, and included everything upon its surface and within its bosom. We find that the thing, the substance of which the United States statute treats, is "lands valuable for minerals," and that it is for the disposition of these "lands" that provision is made in chapter 6 of the Revised Statutes. It is the "lands" in which mineral deposits are found which are "open to purchase." It is "land" claimed and located for valuable mineral deposits, which is the subject of application for patent, and where patent of the United States issues, it is for the "land," at so much per acre. The definition of "land" given in our territorial statute is concise: "The solid materials of the earth, whatever may be the ingredients of which it is composed, whether

soil, rock, or other substance." In the absence of anything in the statute to the contrary, we think it might well be concluded that one becoming the owner or possessor of any of these lands would hold them with and subject to all incidents of ownership and possession at common law. It should be borne in mind that before the enactment of any statute recognizing and regulating his possessory rights, the mining locator, as between himself and the United States was technically a mere trespasser upon the public domain; and that even although he might have conformed in his location to the rules and customs adopted in the mining district in which his claim was situated, yet, so far as any legal right existed to hold his claim against a new-comer, that right rested upon possession merely; hence the statute. Rev. St. U. S. §910.

The government, however, having, in pursuance of its policy of encouraging the discovery and development of its mineral wealth, long tacitly recognized the possession of the miner, has now, by statute, not only given an express license to those establishing their possession in the prescribed method, and provided a way by which the locator may become the owner in fee of the land embraced within the lines of his claim, but has also declared that such locators "shall have the exclusive possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of such surface locations." This statute undoubtedly introduced an important modification of the common-law rule. It gives to the proprietor of a vein a right unknown to the common law—the right to pursue such vein beyond his own lines, outside of that particular segment of the earth embraced within the lines of his claim extending

vertically downward; and it is, therefore, to that extent, an enlargement of his common-law right. But, on the other hand, inasmuch as the same right is granted to every locator under the statute, each holds his possession subject to the same right in others, and is therefore liable to have his land entered by an adjoining proprietor pursuing his vein in its course beyond his own side lines; and to this extent, therefore, his common law possession is abridged.

Two points cannot fail to be noticed in this connection. *First*, that this enlargement of the common-law possessory right is incident only to a claim located in the manner provided by law; and *second*, that the exercise of such right operates to the abridgment of the possession of every tenement penetrated or intersected by a vein having its top or apex in a superior tenement.

Such I understand to be the effects of the statute. I am unable to see that in any other particular essential to this controversy the rights of possessors of mineral lands differ from those of other lands. Says Justice HALLETT, in the case of *Leadville Min. Co.* v. *Fitzgerald*, 4 Morr. Min., 385: "Within the lines of each location the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it as a part of some lode or vein having its top or apex in other territory. In other words, we may say that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits, until some one shall show by preponderance of testimony that such deposits belong to another lode having its top or apex elsewhere." And in the case of *Colorado Central* v. *Equator Min. Co.*, the same learned judge remarks: "Generally, it may be said that a patent for a lode will convey all valuable deposits within the tract described, except such as may belong to lodes and veins which outcrop elsewhere, and come into the tract in their downward course. *Prima facie* the

patentee must be the owner of all that lies within his lines. * * * Every owner by patent shall be sovereign in his own domain, and when he goes beyond that he shall recognize the equal rights of others to the same protection." The United States Supreme Court, in *Forbes* v. *Gracey*, 94 U. S., 767, says that the patentee "obtains the government title to the entire land, soil, mineral and all," and declares that the only distinction between the patentee and the locator is in the ownership of the fee. See, also, *McCormick* v. *Varnes*, 2 Utah, 362; *Wolfley* v. *Lebanon Min. Co.*, 4 Colo., 114; *Pacific C. Min. & M. Co.* v. *Spargo*, 8 Sawy., 645; S. C. 16 Fed. Rep., 348. That actual possession is good and sufficient evidence of title, as against a mere intruder, is established by numerous well-considered cases. I cite a few only: *Grover* v. *Hawley*, 5 Cal., 425; *English* v. *Johnson*, 17 Cal., 108; *Crossman* v. *Pendery*, 8 Fed. Rep., 693; *North Noonday Min. Co.* v. *Orient Min. Co.* (on motion for new trial), 6 Sawy., 507; S. C. 11 Fed. Rep., 125; *Golden Fleece Case*, 12 Nev., 321; *Burt* v. *Panjaud*, 99 U. S., 180; *Campbell* v. *Rankin*, *Id.*, 261; *Trenouth* v. *San Francisco*, 100 U. S., 251; Rev. St. U. S., Section 910.

It would seem, therefore, that one holding a mining claim by mere possession, while on the one hand not receiving that enlarged right incident to a valid mining location, and on the other hand being subject to intrusion by the lawful proprietor of any vein which may be found in its course downward to penetrate or intersect his claim, holds his claim in other respects with and subject to the incidents of possession at common law; and may defend his possession of the surface, and of that segment of the earth included within his surface lines extended vertically downward, with all that it contains, against every one not claiming under superior title. *A fortiori*, therefore, is one holding the patent of the United States for a mining claim entitled to challenge the right of any intruder within the lines of his claim, and to require him to justify such intrusion by proprietorship of a vein having its top

or apex in some other claim, and the pursuit of which on its downward course has brought him to the ground in controversy. Undoubtedly, were the plaintiffs seeking to enforce a similar extralateral right, they would be compelled to prove what the defendant so urgently insisted upon his motion that they must prove, viz., all the incidents of a valid mining location under the laws regulating the same, and that the ore body in controversy was part of a vein of which, by virtue of such location, they had become proprietors; but as we have already seen, such is not the position of the plaintiffs, while on the other hand it is precisely the position occupied by the defendant, and it is just this which renders the doctrine of many of the cases cited by the defendant, as, for instance, *Stevens* v. *Williams*, 1 McCrary, 480; *Zollars* v. *Evans*, 2 McCrary, 39; S. C. 5 Fed. Rep., 172; *Van Zandt* v. *Argentine Min. Co.*, 2 McCrary, 159; S. C. 8 Fed. Rep., 725; *Jupiter Min. Co.* v. *Bodie Min. Co.*, 11 Fed Rep., 669; see, also, *Stevens* v. *Gill*, 1 Morr. Min. 581,—inapplicable to the case of the plaintiffs, while entirely pertinent to the case of the defendants.

For the purposes of the plaintiffs' case mere possession was sufficient; but they have produced their patent, which, as we have before remarked in the case of *Hawke* v. *Deffenbach*, 22 N. W. Rep., 481, announcing the law as laid down in the cases there cited, "is evidence of a perfected right, established by the final adjudication of the tribunal erected for the especial purpose, and carries with it the presumption that every requisite prescribed by law for the acquisition of title has been performed." The failure of the learned counsel for the defendants to recognize the distinction thus pointed out, and their persistence in the contrary theory, seems to have largely colored the whole case, and to lie at the foundation of many of their assignments of error.

But it is further insisted that the patent itself contains certain exceptions and reservations which support the contention of the defendants. We do not deem it necessary to make

any critical analysis of this patent. An examination of it does not disclose any clause which is, in terms, an exception or reservation. In the first place, there is a grant, and that grant is of the mining premises described, together with the statutory rights defined in section 2322, above quoted. Then comes, in the *habendum* clause, at the close, these words: "Subject to the following conditions and stipulations: *First*, that the grant hereby made is restricted to the land hereinbefore described as lot No. 364, with 1,496 lineal feet of the Silver Terra," etc., "through its entire depth, as aforesaid, together with all the veins, lodes, ledges, or deposits, through their entire depth, the tops or apexes of which lie inside the exterior lines of such survey." Now, that is the restriction in the deed. What is the extent of that restriction? Is it a restriction upon the common-law grant? We do not understand it so at all, but we think that it is a restriction upon the grant of the right to pursue any of these veins outside of the lines of location. The right is restricted to the length of those veins within the limits of the claim, so that one cannot pursue them beyond that section of the vein which is included within the end lines of the claim produced. That seems to be the restriction, and, construing this grant with the statutes, that seems to be the plain and reasonable intendment of the grant. As before stated, the common-law right exists to the land and all that it contains, subject only to this abridgment, which is contained in the second clause of the conditions expressed in this deed, viz.: "*Second*, that the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge, or deposit, the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge, or deposit." The whole instrument seems to accord with the statute, and to be

framed upon a construction of the law essentially the same as we have above given.

As to the other grounds presented in support of the motion for nonsuit, it seems sufficient to say that we think the answers clearly contain, not merely admissions, but affirmative averments of all the other facts necessary to make out a *prima facie* case for the plaintiffs. The general denial is of every allegation of the complaint "not hereinafter specifically admitted." This word "hereinafter" embraces all that follows, and authorized the plaintiffs to avail themselves of any admissions therein contained, thus obviating the necessity of any further proof as to the facts so admitted. It may be well, however, to add particularly that we think the irremediable character of the injury threatened sufficiently appears from the averments of the answer that the property in controversy is valuable silver-bearing rock, which defendants propose to remove by the ordinary process of mining. We find no error in the denial of this motion.

Another error assigned consisted in the making of an order permitting an inspection and survey by the plaintiffs of the ground in controversy, and also of the drifts and tunnels by which it had been reached by defendants, and, in fact, all the workings of the mine. This order was made after the close of defendants' case, in the course of which they had examined some 60 witnesses brought in from day to day as the exigencies of the case seemed to them to require, all of whom, of course, had full opportunity to make thorough and repeated inspections and surveys, unembarrassed by any surveillance on the part of the plaintiffs, the whole mine being in the defendants' exclusive possession. It was urgently insisted on behalf of the defendants, who thus persisted in the erroneous theory of the case to which we have before referred, that it was incumbent upon the plaintiffs to make out their case in the first instance by proving their independent title to the specific ore body in controversy as belonging to a vein,

lode, or ledge of which they were the proprietors, and that they could not wait until defendants had introduced their proof before preparing their evidence; and, further, that the court had no right to authorize plaintiffs to enter upon undisputed ground of the defendants for the purpose of inspection and survey. It was further insisted that the statutes prescribed the only method for obtaining such survey, and that the statute was not followed in this application.

The first ground of opposition to this order has already been disposed of. As to the objection that the statute provided the proper relief, the court below held that sections 645 and 646 of the Code of Civil Procedure were designed to provide for common-law actions, and that neither these, nor section 19 of chapter 31 of the Political Code were to be regarded as abridging the chancery powers of the court in cases calling for their exercise. This view we think was correct.

In the present case the existence or non-existence of a vein, its extent, direction, inclination, continuity, and all the physical conditions upon which the rights of the parties depended, could only be determined by minute, careful, and thorough inspection and survey, directed to the precise points elicited by the progress of the trial. The court below said: "The position of the defendants is somewhat remarkable. I cannot account for it. They resist this application, not upon the ground it is unjust for the court to make it, not on the ground the defendants are going to suffer any injury, but almost simply and wholly upon the ground the court has not the power to make it. They do not show, or attempt to show, the court that the defendants are going to be injured in any way, shape, or manner, except the insinuation that the plaintiffs might go in with their witnesses and manufacture testimony. They certainly cannot change the physical facts. If there is danger of the plaintiffs going in there and

manufacturing testimony, it seems to me it would be dangerous on the part of the defendants to have unlimited opportunity; if there is any testimony to be manufactured, it would seem that the party who has the most opportunity to manufacture testimony would be the most liable to do that. So far as that is concerned, I do not think it necessary to impute to either side the desire to manufacture testimony. There is a large number of physical conditions here concerning which witnesses have expressed their opinion, which must be regarded to some extent as matters of opinion, although to some extent, also, as questions of fact. I cannot see upon what theory of equity or good conscience the plaintiffs ought to be excluded from a reasonable opportunity to meet the case which the defendants have now made. They had all the opportunity they desired to make just such a case as they thought themselves entitled to make, or necessary to make, to support their pleadings, and I think the plaintiffs ought to be afforded a fair opportunity to meet their case. In a case like this, where the defendants rest their right to the property upon the existence of a vein having its origin in the lines of another claim of theirs which is not itself in controversy, they thereby, it seems to me, make that an instrument of evidence; they bring it into court, as it were, and they submit it to the inspection of the court. They submit the facts concerning it, and they cannot be permitted to say: 'We will submit it to the court to just the extent we wish to submit it; we will produce just such witnesses as we desire to produce; we will examine them as to just such facts as we choose to examine them upon; we will produce just such evidence concerning it as we choose to produce; and then we will shut the door and lock it.' That cannot be permitted, certainly. They submit it to the court as an instrument of evidence, and they invite scrutiny of it in all its branches, extent, and scope; and it seems to me clear that the plaintiff ought to have a air

opportunity to examine it with his witnesses, and meet the case made by the defendants."

We concur in the views thus expressed, and it is apparent upon an inspection of the order made by the court that the privileges granted were restricted within reasonable limits, and the rights of defendants carefully guarded. The general powers of a court of equity in such cases will be found to be recognized and affirmed in the following authorities: *Thornberg* v. *Sav. Min. Co.*, 1 Pac. Law Mag. 267; *Bennitt* v. *Whitehouse*, 28 Beav. 119; *Ennor* v. *Barwell*, 1 De Gex, F. & J. 529; *Bennett* v. *Griffiths*, 30 L. J. Q. B. 98; S. C. 7 Jur. (N.S.) 284; *Attorney General* v. *Chambers*, 12 Beav. 159; *Blakesley* v. *Whieldon*, 1 Hare, Ch. 176; *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Mass. 80; *Thomas Iron Co.* v. *Allentown Min. Co.*, 28 N. J. Eq. 77.

This brings us to the consideration of the main controversy, the consideration of which will dispose of such of the remaining assignments of error as we think essential. We have already stated that we do not feel called upon in this case to review the findings of fact made by the court below. We shall adopt them as they are. In connection with these findings, and the conclusions of law thereupon, the court also delivered a carefully prepared opinion in writing, which has been sent up with the record to this court; and inasmuch as it states in convenient form the facts and circumstances of the case, and the conclusions to which they lead, and as we agree with those conclusions, we shall adopt that opinion also, or so much of it as is hereinafter quoted, as the basis for our own judgment.

After disposing of some preliminary matters, the district court proceeds as follows: "Coming now to the main questions in the case, which involve the existence, situation, and character of the alleged vein or lode of mineral-bearing rock, the location of defendants' Sitting Bull claim with reference thereto, it is difficult to convey a correct

comprehension of the premises without the aid of one or more diagrams, but I will attempt a description which may suffice for the present purpose. Custer hill, upon which these claims are located, is situated in the village of Galena, in Bear Butte mining district, in this county. The village lies at the base of the western slope of the hill, which presents a lateral face from south to north (taken along the line of the outcrop hereafter mentioned) of 1,300 feet,—of course at the base it is somewhat wider. At its northern extremity it turns to the east, and its northern slope presents a lateral face from west to east of upwards of 3,000 feet at least. Along its base, and following it in this turn, in the direction indicated, is a small stream called Bear Butte creek. These slopes are quite steep, and extend from base to summit about 1,200 to 1,300 feet. The whole country is hilly and broken, and this hill is only one of a series of similar elevations with which it is more or less directly connected. Northwardly across Bear Butte valley, or gulch, which is there perhaps 500 feet or more in width, is another hill known in this case as the 'Florence Hill,' whose southern slope extends laterally, from west to east, nearly parallel with Custer hill. Beginning, now, at or near the southern extremity of the western slope of Custer hill, at a point perhaps half way or more up the slope, there is found an outcropping layer or stratum of a reddish quartzite or metamorphic sandstone several feet in thickness, (upwards of 10 feet at least,) overlaid by a body or stratum of limestone or dolomitic shale of a thickness not definitely ascertained, but certainly extending several feet above the quartzite. I do not mean to be understood as stating that this is the beginning point of this quartzite stratum; but at or near this place the hill turns to the west, and this is the furthest point northwardly or westwardly to which attention has been given in the case. From this point the croppings may be readily traced, in several places by high reef-like ledges

jutting out boldly from the face of the hill, along the western face to its northern extremity. The general bearing of this line of croppings in the direction indicated is given by Mr. Dickerman, one of the defendants' witnesses, as N. 11 deg. W., the distance as 1,243 feet, and the angle of inclination upwards, from south to north, as 3 deg. 26 min. Mr. White, a witness for the plaintiffs, gives the distance as 1,300 feet, and the angle of inclination as somewhat less than that stated. At the northern extremity of the hill this line of outcrop of quartzite, with its overlying limestone or dolomite, turns and extends along the northern slope with a downward inclination, thus gradually nearing the base of the hill, until, at a distance of something over 2,500 feet, (not established by the testimony,) it disappears beneath the bed of the creek.

"There is much conflict of testimony as to whether this last line of outcrop was originally traceable by a natural exposure along the face of the hill, or whether the discoveries on this side were made by following up the quartzite float, or pieces of detached rock, which had rolled down the hill-side, and the edge of the stratum afterwards traced by means of the numerous workings which have since been made there. There is considerable natural exposure towards the eastern end of the line, but the hill-side there is very precipitous and inaccessible. Mr. Frank Davey testifies to a natural exposure of quartzite all along the face of the hill on the line which I have called the line of outcrop; but I do not remember any other witness who testifies positively to this, while numerous witnesses testify that, although they looked for such exposure, they could not find any, at least in the Sitting Bull location; and I think it clearly appears from the testimony of Donegan, the original locator of the Sitting Bull, that he was led to his discovery entirely by float, and found no outcrop at all, except where he and his co-locator exposed it by uncovering the ledge. He says expressly

that they found it by finding float down the hill, and followed it up until they couldn't find the float,—there they concluded must be the apex of a vein. It should be mentioned, however, that considerable work was done upon the ledge, by which it was exposed in many places, and a road was cut along the hill-side,—so that what Mr. Davey took for natural exposures may have been portions of the ledge uncovered by work. There is no doubt, however, that whether it come within the strict definition of an outcrop or not,—given by one learned author (Geike) as 'the edges of strata which appear at the surface of the ground,' and by another (Van Cotta) as 'that portion of a vein appearing at the surface,' the northerly edge of this stratum of quartzite, with its overlaying stratum of limestone, extends in the manner already indicated, on a line at or near the surface, all along the northerly face of the hill, and would seem to come within the definition given by Dr. Raymond in his glossary: 'The portion of a vein or stratum emerging at the surface, or appearing immediately under the soil and surface *debris*.'

"The general course and direction of this line of outcrop are indicated by Prof. Dickerman, who testifies that from the point on the outcrop already referred to, on the northern extremity of the hill, at the turn, to a point thence distant 1,950 feet, (about 100 feet west of the east end of the Sitting Bull location, hereafter described,) the bearing is N. 70 deg. 30 min. E., and the angle of declination 9 deg. Along the whole line of this outcrop, as thus described, locations of mining claims appear to have been made, which I note here, as they have been referred to in the testimony, mainly for the convenience of description and reference. First on the south is the War Eagle location; north of that the Savage; then, on the same face of the hill, the Custer. I believe another location called the 'Highland Chief' embraces some part of this line, but have no reference to it. On the northern slope

are, first the Neptune, then the Sitting Bull, and then the McClellan,—all located in an easterly and westerly direction, end to end, along this line of outcrop already described, extending across the northerly face of the hill. More specifically, with reference to the Sitting Bull, that location is situated about midway—east and west—of the northerly face of the hill, and extends from the point of discovery about 690 feet in a direction S. 74 30 W., (reversely N. 74 30 E.,) and from the same point about the same distance N. 89 30 E. The end lines are parallel, having a bearing of S. 35 deg. E. The claim is thus about 1,380 feet long, and is about 300 feet in width. Throughout this length the line of outcrop described is wholly within the side lines of the location, and passes through the end lines very nearly at their middle points. Adjoining the Sitting Bull on the south, and passing up the hill in the order named, are the Tiger Tail, Surplus, Fraction, and Silver Terra locations, all laid substantially parallel with the Sitting Bull. The Tiger Tail is owned or claimed by the defendants; the others by the plaintiffs, or some of them. Adjoining the Tiger Tail and Surplus on the west, and the Sitting Bull on the north, is another claim of the plaintiffs' called the 'Richmond.' For the Silver Terra and Sitting Bull claims the plaintiffs and defendants respectively hold patents of the United States. As already stated, the ledge within the Sitting Bull location has been exposed by numerous excavations, and drifts have been run in various directions in the quartzite, from all of which more or less valuable silver ore has, from time to time, been extracted. The main working tunnel starts at a point near the discovery tunnel, and extends in a generally southeast direction about 700 feet across or through the intervening claims, and a short distance into the ground embraced within the vertically extended lines of the Silver Terra. Branching off from this main tunnel, and, as Mr. Frank Davey says, in every conceivable direction, are numerous

extensive drifts. At the end or face of the main tunnel a large chamber has been excavated, disclosing a body of valuable silver ore, which defendants were engaged in removing when stopped by the injunction issued in this action.

"All these workings are in the quartzite, disclosing throughout pretty much all their extent the overlying stratum of limestone, which forms the roof of the workings, and upon the contact of which with the quartzite the drifts have mainly been run, although in some places this roof has been broken into, and in other places, where the cleavage was imperfect, the quartzite has been left in place. This roof or wall is quite smooth and regular,—remarkably so, is the testimony of several of the more experienced witnesses. The floor of the workings is also in the quartzite, which is thus shown to have a thickness of at least seven feet, and other testimony established a thickness of at least ten feet. Beyond this its extent is uncertain.

"The defendants contend that by their excavations, one on the edge of the ledge outside and two within the workings, a chloritic quartzose shale has been discovered a few feet below the floor, essentially differing from the quartzite, and forming a distinct foot-wall. The plaintiffs deny any essential difference in the rock so disclosed, and claim that other explorations, which are testified to, establish the continuity of the quartzite for an undetermined extent downward, and contend that at all events the limited excavations made by the defendants are not sufficient to establish the existence of a foot-wall, as claimed. The evidence is practically undisputed that throughout its whole extent, so far as disclosed by the workings of the defendants, the quartzite is mineralized with iron and silver in various forms of deposit; the iron being mostly in the form of an oxide, giving a reddish tinge to the rock, and the silver existing in the form of native silver, sulphurets, chlorides, bromides, ruby silver, and carbonates.

These silver ores are found impregnating the quartzite more or less throughout, it being in some places considerably decomposed, and in others retaining its massive appearance, with little or no external indication of richness; but Mr. Davey testifies that among some thousands of assays of this quartzite, taken from time to time from all parts of the workings, he has never found any which did not show an appreciable quantity of silver. Besides the forms of deposit already mentioned, bodies of galena bearing silver are also found distributed in bunches, pockets, and bands or sheets of varying extent throughout the workings, but not in any continuous body. Generally these ore deposits are found to be richest along the contact of the roof, extending three or four feet downward. Sometimes they are found lower down. Occasionally the galena would shoot up in the limestone, then again down to the floor.

"Prof. Dickerman is of the opinion that this galena was brought up and deposited in a molten condition, and that all the other forms of deposit have proceeded from it by decomposition and impregnation. Mr. Riotte, another expert, witness for the defendants, and a gentleman of large experience and scientific attainments, is of the opinion that at or about the time of the first metamorphism of sandstone into quartzite the galena was brought up in solution by means of a hot spring, and that long subsequently the second metamorphism of the quartzite took place into its present condition, which he says is strictly quartz, and then the other silver ores were brought up and deposited by similar means. Between these two theories I do not feel called upon to decide. I am satisfied that whatever the cause, the result was a continuous impregnation and mineralization of the quartzite with silver throughout, so far as disclosed by the Sitting Bull workings, and extending to the ground in controversy.

"Following the main working tunnel from the point where it passes through the south side line of the Sitting Bull,

through the intervening ground, and into the ground in controversy, the floor of the tunnel and the roof in the line of direction of the tunnel have a general downward inclination of about 4 deg.,—greater where it trends to the east, less where the trend is toward the south. Upon the Richmond location, before mentioned, plaintiffs have sunk a shaft, from which at a depth of 100 feet a drift or tunnel has been run by them, extending in a southeasterly direction to where it reaches the vertically extended north line of the Surplus; then turning somewhat more to the east, until it passes the north line of the Silver Terra; and then again turning in a direction very little south of east, until it passes some distance beyond the point where it would be intersected by a continuation of the defendants' main drift, —heading it off, so to speak,—and separated from it at that point by not more than four or five feet of intervening rock. This tunnel, throughout its whole extent of some 800 feet, was run in the quartzite, disclosing and following the overhanging roof of limestone, and encountering several bodies of galena and other pay ore; but although very little testimony was offered on this point, I understand the plaintiffs to say that except where these ores were encountered they did not consider the quartzite rich enough to pay. Incidental mention was also made in the evidence of tunnels run in for short distances on the quartzite from the west on the War Eagle, Savage, and Custer locations. I may add here that, except at the entrance to the drifts, the workings are not timbered,—the rock everywhere being found firm and massive. Of course, pillars are left at proper intervals.

"The facts thus far given are, I believe, mainly uncontradicted, except where otherwise stated. I come now to a consideration of those about which there has been more or less conflict of testimony. Foremost and most important of these is the question as to the direction of the dip or

downward course of this stratum of quartzite, with its overlying limestone. Upon this point a large number of witnesses were examined, and a great deal of testimony taken. Many surveys were made by different methods, and with various kinds of instruments, the value of all of which depends largely upon the degree of care, judgment and honesty exercised in selecting points of observation. A number of maps were exhibited illustrating various methods and results, and models of the hill were introduced by both sides, showing the general contour of the hill, and a section thereof in the plane of the quartzite stratum; but inasmuch as these models and maps purport to be constructed mainly from the surveys, they are, of course, to be regarded as illustrations, correct only in so far as they conform to those surveys. I shall not attempt an extended analysis of all this testimony, but shall briefly review it and give the result."

The court here reviews the testimony upon this point, and concludes thereupon as follows: "I think it will be sufficiently correct for the purposes of this case, and, indeed, I do not see how any essentially different result can be reached from the testimony, if we determine that the dip of this stratum of quartzite, with its overlying limestone, is east. The general angle of declination of this stratum, or its departure from the horizontal, I find to be from 7½ to 8 deg. If it were taken from the westerly line of outcrop, a somewhat greater angle would be given; but the evidence seems to show that by some means, probably by the occurrence of a porphyry dike which is found there, the northeast corner of the hill has been slightly tilted up, causing a local variation.

"There is considerable discussion and variety of opinion as to whether the stratum of quartzite outcropping along the southerly face of the Florence hill was to be regarded as having originally formed a continuation of that in the Custer hill, the plaintiffs contending that it corresponds

in the conditions of its occurrence and general characteristics, as well as in the inclination downward towards the creek, with the stratum in controversy, while this is denied by some of the defendants' witnesses, especially by Mr. Riotte. From all the testimony on this point, I think it probable that the sedimentary rocks composing both these hills were originally deposited in similar and continuous formation; that by some dynamic process these hills were subsequently elevated to their present positions, and the characteristic conditions of their respective rocks somewhat differentiated; that by the same process of upheaval the waters of Bear Butte creek were directed into a channel having the general direction of its present course; and that by the erosive action of these waters, and the gentler but equally efficient forces of rain and snow and frost, the edges of these strata have been exposed, to be again covered by the gradual accumulation of soil upon the hill-sides. But of these ancient and gigantic processes of nature it becomes us to speak with great diffidence, and I do not deem this point essential to a determination of the case. It is also claimed by defendants, that along the northerly face of the hill, and for a width, say, of 50 to 75 feet,—perhaps a little more in some places,—the edges of the strata have been broken up and disintegrated by the action of the elements, and in this condition have yielded to the downward 'slide' of the surface, and have been somewhat bent over, so as to impair the value of observations taken within that region. It is true that the testimony shows the limestone to be much broken up towards the edge, as it naturally would be; but whether it is actually bent over, or to what extent, does not clearly appear, nor do I think it clearly appears that the quartzite has been dislocated by this process. At all events, there are no *data* from which any certain result can be ascertained as due to this circumstance, and I cannot regard it as essentially varying the conclusions reached.

"I pass now to a consideration of the law governing this case, and the legal inferences to be derived from its application to the facts thus ascertained. Recurring to the proposition laid down in the earlier history of the case, that by their possession, and *a fortiori* by their entry and patent, of the Silver Terra claim, the plaintiffs show themselves entitled to everything within the vertically extended side lines of that claim, including even a body of ore forming a part of a vein, lode, or ledge, having its origin or beginning outside of those lines, until some one shall appear to claim it with a better title, as the proprietor of such vein, (it being conceded, as I understand it, that the Silver Terra location was not based upon a discovery of this particular ore body, or of any vein, lode, or ledge, of which it formed a part,) and recalling also the conditions under which alone such better title can be made to appear, we inquire:

"*First.* Is the ore body in controversy part of a vein, lode, or ledge of quartz or other rock in place, bearing silver, within the meaning of the statute? Various definitions have been given of 'veins' and 'lodes.' I shall seek no new one, but content myself with stating a few which have received high judicial sanction. Justice HALLETT'S definition is: 'A body of mineral, or mineral-bearing rock, within defined boundaries, in the mass of the mountain.' Judge GODDARD gives this definition: 'Any mineralized belt or zone of rock, lying within boundaries clearly distinguishing it from the neighboring rock, coming from the same source, impressed with the same forms, and appearing to be created by the same process.' This definition was originally given by Justice——. Justice FIELD gives the same definition, and also the following: 'A continuous bed of mineralized rock, lying within any other well-defined boundaries on the earth's surface, and under it.' And Justice MILLER quotes approvingly all the definitions above given. In the great case of *Richmond Co.* v. *Eureka Co.*, 103 U. S. 839, tried

before Justices FIELD, SAWYER, and HILLYER, the evidence showed a zone or belt of limestone between walls of quartzite and shale. This limestone was much broken up, disintegrated and fissured, and throughout these fissures ore was deposited in irregular bunches, patches, caverns, and spaces of every variety of form and size, irregularly disseminated through the mass, with a succession of great cavities lying irregularly across the limestone, the whole mass being irregularly impregnated with the ore. This was held to constitute one lode, within the meaning of the law. Dr. Raymond has somewhere defined a 'lode' as that which the miner can follow, expecting to find ore.

"Two of the defendants' witnesses, Messrs. Dickerman and Riotte, gave it as their opinion that the deposits of galena in this mine constituted a vein, within and separate from the lode, and having a downward direction nearly parallel with the end lines of defendants' claim; and it was contended that this constituted a vein which would meet the conditions proposed, and give the defendants the right to follow it into plaintiffs' ground. But I do not find any evidence which at all satisfies me either as to the continuity of this galena deposit, apart from the lode, or as to its direction. Nor do I perceive how, consistently with the other evidence, it can be claimed that this could be followed and worked separately from the lode. The only evidence of direction that I recall is found in the testimony of Mr. Riotte, who says that he found *striæ* or furrows in the contact; that *striæ* invariably indicate the direction of ore chutes in a vein; and that in any given vein the ore chutes are always parallel; and that in one place in this vein where he found *striæ* he took their direction with a compass, and found it to be a little north of south-east. As to the existence of *striæ*, and their indications, I think he is corroborated to a limited extent by Prof. Dickerman. But besides that, I am not satisfied that Mr. Riotte's theory is one generally

accepted by scientists. I am not willing to place a finding upon so slender a basis of facts. No other witness that I remember advanced this view, and, indeed, Mr. Riotte himself, after giving the same definition of a lode as that of Dr. Raymond, just quoted, and in answer to a question by the court as to whether these chutes of ore or the body of the quartzite would be the lode which would lead the miner on, answered: 'The body of quartzite, decidedly.'

"A somewhat simliar theory was advanced by the witnesses of the defendant in the *Eureka-Richmond Case*, though with a different purpose, respecting deposits attempted to be designated as separate veins. But, in the language of the court in that case, 'they are but parts of one greater deposit, which permeates in a greater or less degree, with occasional intervening spaces of barren rock, the whole mass of limestone.' Substituting 'quartzite' for 'limestone,' these words are apt and pertinent to the present case. And while I am not entirely satisfied of the existence of the particular foot-wall claimed by the defendants, yet I consider that a stratum of massive rock of this character, overlaid by a solid mass of limestone, and mineralized as this is, comes clearly within the definitions given; and I must therefore find this body of quartzite to be a vein, lode, or ledge of rock in place, bearing silver, within the meaning of the statute.

"*Secondly.* Is the top or apex of this vein or lode within the lines of the Sitting Bull location? The definition of the top or apex of a vein usually given is 'the end or edge of a vein nearest the surface'; and to this definition the defendants insist we must adhere with absolute literal and exclusive strictness, so that wherever, under any circumstances, an edge of a vein can be found at any surface, regardless of all other circumstances, that is to be considered as the top or apex of the vein. The extent to which this view was carried by the defendants, and, I must confess, its logical results, were exhibited by Prof. Dickerman, their engineer, who, replying to an

inquiry as to what would be the apex of a vein cropping out at an angle of 1 deg. from the vertical, on a perpendicular hill-side, and cropping out also at a right angle with that along the level summit of the hill, stated that in his opinion the whole line of that outcrop, from the bottom clear over the hill as far as it extended, would be the apex of the vein. Some other witnesses had a similar opinion. The definition given is no doubt correct under most circumstances, but, like many other definitions, is found to lack fullness and accuracy in special cases; and I do not think important questions of law are to be determined by a slavish adherence to this letter of an arbitrary definition. It is indeed difficult to see how any serious question could have arisen as to the practical meaning of the terms 'top' or 'apex,' but it seems in fact to have become somewhat clouded. I apprehend if any intelligent person were asked to point out the top or apex of a house, a spire, a tree, or hill, he would have no difficulty in doing so, and I do not see why the same common sense should not be applied to a vein or lode. Statutory words are to receive their ordinary interpretation, except where shown to have a special meaning; and, as I think the testimony shows that these terms were unknown to miners in their application to veins before the statute, the ordinary rule would seem to apply to them.

"Justice GODDARD, a jurist of experience in mining law, in his charge to the jury in the case of *Iron Silver* v. *Louisville*, defines 'top' or 'apex' as the highest or terminal point of a vein 'where it approaches nearest the surface of the earth, and where it is broken on its edge, so as to appear to be the beginning or end of the vein.' Chief Justice BEATTY, of Nevada, who is mentioned in the report of the public lands commission of 1879–80 as 'one of the ablest jurists who has administered the mining law,' in his letter to that commission says, after defining dip and course of strike: 'The top or apex of any part of a vein is found by following the line of its dip up to the highest point at which vein matter exists in the fissure. According

to this definition, the top or apex of a vein is the highest part of a vein along its entire course. If the vein is supposed to be divided into sections by vertical planes, at right angles to the strike, the top or apex of each section is the highest part of the vein between the planes that bound that section; but if the dividing planes are not vertical, or not at right angles to a vein which departs at all from a perpendicular in its downward course, then the highest part of the vein between such planes will not be the top or apex of the section which they include.' Report Pub. Lands Com. 389.

"I am aware that in several adjudged cases, 'top' or 'apex' and 'outcrop' have been treated as synonymous, but never, so far as I am aware, with reference to a case presenting the same features as the present. The word 'apex' ordinarily designates a point, and so considered the apex of a vein is the summit; the highest point in a vein is the ascent along the line of its dip or downward course, and beyond which the vein extends no further, so that it is the end, or, reversely, the beginning, of the vein. The word 'top,' while including 'apex,' may also include a succession of points,—that is, a line—so that by the 'top' of a vein would be meant the line connecting a succession of such highest points or apices, thus forming an edge.

"I have spoken of the 'dip' or 'downward course' of the vein, treating these words as synonymous, and so I think they must be regarded. 'Dip' and 'depth' are of the same origin—'dip' is the direction or inclination towards the 'depth,'—and it is 'throughout their depth' that veins may be followed, and that is surely their downward course. Mr. Riotte gives us a different definition. He says: 'Starting any line upon the apex of the vein, and running down upon the vein parallel to the end lines, (of the location), the inclination that line has is the downward course of the vein.' And when asked: 'So that the direction of the end lines of a mining location absolutely fixes the downward direction of the course of the vein?' he

replies: 'As far as it interests the man who has located that claim.' Elsewhere he says that, in his view of the law, end lines of locations are, as he expresses it, 'swingable'; so that when the locator determines the direction of his ore chutes he may swing his end lines parallel to them, so as to take them in throughout their depth. A very little reflection will show that, if this be the law, a locator, instead of being limited to 1,500 feet along the vein, could readily place his end lines at such an angle as practically to control nearly 3,000 feet of the vein. With all proper respect for this gentleman's opinion, I cannot accept his views upon this subject at all. I think it clear that the law intended these lines to be laid substantially at right angles to the general course or strike of the vein, since in no other way could the locator be limited to a given length along the ledge.

"This seems to have been the view taken of the law by the three learned judges who sat in the *Richmond-Eureka Case.* It is true that they hold that the provisions of the law of 1872 requiring parallel end lines may be regarded as merely directory, so that a failure to so lay them would not invalidate the location; but I think the whole force of the observations of the court upon this point lies in their assumption that it makes no difference how the miner may choose to locate his end lines, since the law limits his right to that section of the lode or ledge carved out by vertical planes drawn through the extreme points or ends of his line of location at right angles with a line representing the general course or strike of the lode. In this same case, on appeal to the Supreme Court of the United States, (103 U. S. 844,) the fact is noted that the 'zone,' as it is called, dips at right angles to its course or strike, and that the extension downward of the compromise line, which was coincident with the end lines of the adjacent claims, followed the dip of the zone.

"I have been led into some digression from the strict line of my argument. Bearing in mind the descriptions

heretofore given of the two lines of outcrop on Custer hill, if we might suppose that the outcrop along the northerly face were nearly vertical, I do not see how it could be seriously contended that such outcrop, under the circumstances, constituted the top or apex of this stratum of quartzite. Such a conclusion could only be reached, it seems to me, by shutting one's eyes to every feature of the case, except the one fact that there was an edge at or near the surface, which was therefore the top or apex of the vein. This I cannot do without such a violation of the ordinary use of words, and, with all the respect and deference which I feel for the opinions of the learned counsel for the defense, I must say without such a transgression of the dictates of a sound common sense view of the situation, as, in my judgment, the statute does not contemplate. Nor can I see that there would be any difference whatever in the principle were this outcrop to be found at an angle of 45 deg., or, as it is, at an angle of about 8 deg. from the horizontal. I am compelled, therefore, to hold that this outcrop found in the Sitting Bull location is not the top or apex of this vein, lode, or ledge, and that such top or apex is not within that location. I must regard that outcrop as merely an exposure of the edge of the vein on the line of its dip.

"But, *thirdly*, if this is not the top or apex of the vein, then neither is it its longitudinal course. That by the use of the term 'along the vein' the statute requires a location to be made along its longitudinal course or strike I shall not stop to argue. Such, again, was the opinion of the court in the *Eureka-Richmond Case*. But by the term 'strike,' in this connection, I do not mean the technical true strike of the engineer; the line which would be cut by a horizontal plane. Such a requirement would be in many cases impracticable. The Supreme Court of the United States has said in the *Flagstaff Case*, (*Mining Co.* v. *Tarbet*, 98 U. S. 463,) that 'the most practicable rule is to regard the course

of the vein as that which is indicated by surface outcrop, or surface explorations and workings'; and I have no disposition, as I should not be at liberty, to disregard the doctrine of that case, so far as it is applicable to the circumstances. In that case a line of outcrop ran up a hill nearly in a westerly direction. A level line run somewhere beneath the surface showed the 'strike' to be north 50 deg. west. The line of the Titus location was not far from midway between these two, and the court held, as against the Flagstaff, which was laid across these lines, that the location of the Titus was a good one, using the language above quoted. There, moreover, the dip of the vein was north-eastward, and no such question arose as that involved in this case. In view of the principles already laid down, I think that the longitudinal course of this zone of quartzite is indicated by the croppings on the west face of the hill, and not by those on the northerly slope.

"After what has been said, it would seem unnecessary to consider whether this vein so far departs from a perpendicular in its course downward as to extend outside the vertically extended side lines of defendants' location, and through the intervening ground to the ground in controversy,—such could not be the case consistently with the facts already ascertained. It may be conceded as, indeed, a mathematical conclusion from the facts, that by extending drifts from the Sitting Bull location through its vertically extended south side line, in any direction upon the vein east of south, a downward inclination would be found, and that such is the fact with regard to the main working tunnel, which extends to the ground in controversy; but, clearly, this is not what the statute contemplated, and, if I am right in my other conclusions, probably this proposition would not be contested."

We concur in the views thus expressed.

It was unnecessary for the court to determine affirmatively the precise location of the top or apex of the vein in question. The court did find "that the outcrop on the westerly slope of the hill above described was the summit, top, or apex of said zone, ledge, or stratum of quartzite," but did not determine whether or not it was technically the top or apex of the vein. Possibly that might have involved an inquiry as to the continuity of its mineralization to the summit. The question the District Court had to determine was whether the top or apex of this vein was or was not within the Sitting Bull location. It determined that it was not, and, as we think, correctly.

The judgment and orders appealed from are affirmed, and the findings and conclusions of the District Court are adopted by this court.

For affirmance: EDGERTON, C. J., HUDSON, CHURCH, PALMER, and SMITH, JJ.

For reversal: FRANCIS, J.

BARNARD v. ROANE IRON CO. (Two cases.)

(85 Tennessee 139; 2 S. W. 21. Supreme Court. October 12, 1886.)

Principal must answer for agent's fraud. The principal cannot take the benefit of a contract obtained by his agent through his agent's false representations and at the same time deny himself responsible for the making of such allegations.

Inadequacy of price so gross as to shock the conscience may furnish sufficient ground for vacating, through equity, a conveyance executed or executory.

Misrepresentations are fraud per se. Misrepresentation of material facts or the projection of false impressions in order to mislead or obtain an undue advantage is a fraud in terms.

Misrepresentations are not merged in the contract induced by them, but are grounds upon which to vacate it.

Laches. Defendants in 1872 bought the mineral in a tract of land at $2.50 per acre. In 1883 plaintiffs retendered the purchase money and demanded reconveyance on the ground of fraud. The alleged representations were general—that a Railroad would be built, etc., and inadequacy of consideration was alleged: *Held*, that even if a fraudulent intent in the purchaser were shown the long and unaccounted for delay was an absolute bar to relief.

Inadequacy of consideration depends on the value of the land at the time of the purchase and not at the time of the suit.

Appeal from Chancery Court, Roane County.

If without fault of the plaintiff he is unable to restore the consideration provision for its repayment may be made in the final decree. *Thackrah* v. *Haas*, 119 U. S. 499.

Courts have the power to compel rescission of mining contracts for sale of mining property situated beyond their jurisdiction. *Loaiza* v. *Superior Court*, 85 Cal. 11; 24 Pac. 107.

By suing for damages plaintiff affirms the contract and he cannot afterwards maintain suit for rescission. *Wheeler* v. *Dunn*, 13 Colo. 428; 22 Pac. 827.

Vendor cannot sue to rescind executed contract on grounds that grantee had no power to purchase. *Long* v. *Georgia Co.* 91 Ala. 519; 8 So. 706.

Where land was conveyed by deed which passed no title the grantee need not offer to reconvey before suit for rescission. *Adams* v. *Reed*, 11 Utah 480; 40 Pac. 720.

Where the existence of coal was the inducement to the contract and the coal did not exist the contract should be rescinded, both as to the

Action for rescission of contracts and cancellation of deeds. Judgment for plaintiffs. Defendant appeals.

L. A. GRATZ, for complainants.

SEVIRE & WELCKER, for respondent.

FOLKES, J. The complainants and their ancestor, Jonathan Barnard, were owners of certain lands in Roane county. On the fourteenth day of June, 1872, they executed the following instrument:

"This agreement, made and entered into this the fourteenth day of June, 1872, is for the following effect and purposes, to-wit: That whereas, we, the undersigned parties, being seized and possessed of certain lands, lying and being in the Ninth and Tenth civil districts of Roane County, on the waters of Riley creek, upon which iron ore is known to exist, and being desirous that the same may be developed and worked, do hereby agree to sell to the Roane Iron Co. all the iron ore, with all the rights, including timber for mining purposes only, necessary to mine and convey the same from off said lands, on the following conditions: The lands are to be surveyed at the expense of the Roane Iron Company, and at their option, within six months, and the number of acres of ore lands marked

coal and the timber which was of value only as incident to coal mining. *Bluestone Co.* v. *Bell*, 38 W. Va. 297; 18 S. E. 493.

Rescission for fraud must be brought within a reasonable time. *Cowen* v. *Harrington*, (Ida.) 48 Pac. 1059.

Plaintiff asking rescission must first offer to place defendant in statu quo. *Breyfogle* v. *Walsh*, 80 Fed. 172. *Minah Co.* v. *Briscoe*, 47 Fed. 277. *Stephens* v. *Wood*, 39 Oreg. 441.

Money paid must be restored, even where plaintiff's mental incapacity is one of the elements of the fraud charged. *Strodder* v. *Southern Co.* 94 Ga. 626; 19 S. E. 1022; *Strodder* v. *Southern Co.* 99 Ga. 595; 27 S. E. 174.

Rescission of contract because vendor had already conveyed away the property's mineral values. *Carney* v. *Harbert*, 44 W. Va. 30; 28 S. E. 712.

out on said survey, upon each of said lands; and we further agree to deed and convey, upon the payment of the purchase money, from ourselves, our heirs or assigns, to the Roane Iron Company, their heirs or assigns, all the ore in land marked out in said survey, for the sum and at the rate of two and fifty one-hundredths ($2.50) dollars per acre.

"Witness our hands and seals this fourteenth day of June, 1872."

A few moments thereafter, on the same day, for reasons that will appear later on, Wilder, as agent of defendant company, executed the following agreement:

"Know all men that I, J. T. Wilder, superintendent of the Roane Iron Company, having this day contracted from certain parties named in an agreement here referred to certain ore in lands on the waters of Riley creek, and I do hereby agree to test or try a part or portion of the same, at some convenient point or place thereon, before the expiration of the year 1873. And I do further agree that when said test shall have been made, if the Roane Iron Company decide that they cannot or will not mine or use the same, that the company aforesaid shall, upon the demand of the parties aforesaid, and the payment of the purchase money, reconvey to the original parties making such demand all the rights, immunities, or title conveyed by the parties aforesaid to the Roane Iron Company. This June 14, 1873."

The date is admitted to be a clerical error, and it is agreed in the pleadings that it should be 1872.

It is not controverted that these two papers were made at the same time and place, and the latter left with John Blair (at whose house the meeting between Wilder and the signers of the contract of sale took place) for safe keeping, he being a neighbor of complainants.

On the seventh December, 1872, the complainants' testator, Jonathan Barnard, in pursuance of the agreement to convey, executed a conveyance to the Roane Iron Company of the

mineral interest in 46 acres, at $2.50 per acre, acknowledging the receipt of the consideration of $115. On the same day complainant J. M. Barnard, in consideration of $22.57, and complainants John A. Barnard and wife, in consideration of $47.58, conveyed to the defendant company the iron ore on their lands embraced in certain designated boundaries.

On the seventeenth day of April, 1883, the attorney for the executors and heirs at law of Jonathan Barnard made a tender of the purchase money, with interest, to the defendant company, through its president, and demanded a reconveyance of the iron-ore interests. The tender and demand were made orally, and accompanied with a written demand, as follows:

"*To the Roane Iron Co.:* Demand is hereby made upon you to reconvey to us the iron-ore interest deeded to you by Jonathan Barnard and Sarah Barnard, by an instrument in writing bearing date December 7, 1872, by reason of your failure to test or try a portion of said ore, in accordance with the obligation signed by you on the fourteenth day of June, 1873, and for your failure to mine or use the same; and also for your failure to carry out the other, further, and different conditions agreed to by you; and I hereby tender to you the sum of $115, principal, and the further sum of $71.85, being the interest thereon, the consideration paid by you to me for said ore interest.

"*Kingston, Tennessee, April* 17, 1883."

—Signed in the name of the heirs of Jonathan Barnard, by E. E. Young, attorney.

A substantially similar demand and tender was made at the same time, separately, for John A. Barnard and J. M. Barnard, which tender and demand being refused by the president of the company, these three bills were filed on the ninteenth of April, 1883.

In the bill filed by the executors and heirs of Jonathan Barnard it is alleged that he died in 1875; "that at the time the deed was made he was a very old man, past 83 years of

age, feeble in body; and while not deprived of mental faculties yet they were considerably impaired and weakened, while defendant's agent and officer was an active, vigorous, and middle-aged man."

With this exception, the charges and allegations of the three bills are substantially the same. They charge that the deeds were procured by misrepresentation and fraud, in this: that the agent of defendant who examined the lands for ore "was an educated man, well understanding the indication, outcroppings, and value of iron ore," while the complainants were plain farmers, understanding nothing about mineralogy; that said agent represented that the ore in complainants' land was in a perpendicular vein, and consequently of little, or, at any rate, of greatly less value than if found in a horizontal vein; "that such representations were false, the ore being of great value, worth thousands upon thousands of dollars."

The bill further charges that, in addition to the promises contained in the written agreement signed by Wilder for the company, of date June 14, 1873, (1872,) there was yet another condition not expressed therein, which was an agreement to construct, within a period of three years, a line of railroad connecting the lands to be deeded to it with the Tennessee river, where the cars were to be transported by boat to Rockwood landing, thence to be run, upon the track of defendant's railroad, to Rockwood; that, when completed, this railroad should "carry free of charge" to complainants, all garden products, and small articles usually shipped from a farm to the markets, "and heavy grain for a very moderate charge."

The bill then charges, in very glowing language, the transcendent beauties of the picture painted by Wilder of the marvelous growth and development of the country that would follow the introduction of the railroad; and adds:

This "operated upon the minds of the parties agreeing to convey with greater force than any other consideration, and

formed the chief inducement for entering into the agreement."

It is charged that the promise to build the railroad was to have been incorporated in the agreement signed by Wilder, and that complainant supposed, until a short time before filing the bills, that it was inserted therein.

They say that "ten years have elapsed since defendant bound itself to test and try the ore,—determine whether or not it will work the ore,—and seven years have gone by since the railroad was to have been finished, yet nothing whatever has been done to carry out any of the undertakings; that they are forced to the conclusion, and they charge, that the representations of building a railroad and developing the country were false, and designed merely to mislead complainants, and induce them to part with a valuable property for a mere trifle."

They charge that "the real design of the defendants was to monopolize and accumulate all the iron ore within reasonable reach of its furnace, at Rockwood, Roane county, Tennessee, so as to prevent all possible competition; and, instead of developing the country, to drive out from competition all persons who might otherwise be attracted by the favorable conditions," etc.

The prayer is that "the deed of December 7, 1872, be declared fraudulent, null, and void, and that the same be rescinded, and the title to the ore iron, and other privileges therein granted, be restored to complainants;" and that in the meantime the defendant be enjoined from conveying or incumbering said property; and for general relief.

To these bills a demurrer was interposed upon several grounds; among others, the statute of limitation of one year, three years, and six years. The demurrers were overruled, with leave to rely on the same in answer, and need not be further noticed.

Answers were filed denying all fraud, and all misrepresentation; meeting all such charges with specific denials. In

addition to the denial of any promises to build a railroad, the authority of said Wilder and McElevee *to bind* the company by any such representations or promises, if any were made, is denied. The authority of Wilder to bind them by the contract to reconvey was also denied; but, if bound thereby, they say they did make the test, and did determine that they *could* and *would* use the ore; and in consequence of such test, and of such determination, they did, on the seventh of December following the making of such contract, signify their determination in the premises by completing the purchase, demanding and receiving deeds from complainants, and paying therefor, in pursuance of the terms of the contract of June 14, 1872.

Proof being taken, the causes were consolidated and heard together by consent. The chancellor adjudged the conveyances invalid and void for fraud, and that they be set aside and canceled, and this, too, without any return of the purchase money. The failure to decree a return of the purchase money is, however, admitted by counsel for complainants to be erroneous, and is said to have been the result of inadvertence.

We concur, in the main, with the conclusions of law announced by the learned chancellor who decided the case below. It cannot be denied that the fraud of an authorized agent will avoid a contract entered into by him on behalf of his principal, although the misrepresentation may have been unauthorized. The principal cannot make the contract his own by availing himself of its benefits, and at the same time avoid being responsible for the fraud upon which it is based. *Franklin* v. *Ezell*, 1 Sneed, 497. It may also be admitted that inadequacy of price, where it is so gross as to shock the conscience, may furnish sufficient ground for vacating a conveyance in equity, whether executed or executory. Pom. Eq. Jur. §§ 926–928.

It is likewise true that where a party intentionally or by design *misrepresents* a material fact, or produces a false

impression, in order to mislead another, or to obtain an undue advantage of him, in every such case there is a positive fraud in the fullest sense of the term. Nor can it be maintained that the evidence of the fraudulent representations is to be excluded upon the doctrine that all representations are merged in the writings subsequently executed by the parties. This rule has no application when a suit is brought to be relieved against a written instrument on the ground of fraud. The purpose is not to contradict or vary the terms of the written agreement, but relief is sought upon the ground that, by false representations, the parties are entrapped into an agreement which they would not otherwise have made. It is not denying the deed, nor its terms, to insist that it is vitiated by fraud. *Finlay* v. *King's Lessee*, 3 Pet. 382.

With these propositions of law resolved in favor of complainants, come we now to consider what measure of relief they are entitled to receive under the facts as disclosed in this record. It would be tedious and unprofitable to quote the language of the many witnesses examined in these causes. It must suffice to say that a careful analysis of the testimony fails to sustain the liberal charges of fraud in the bills contained in any material particular. It is true that two of the Barnards say that the railroad was promised, and that it was the main inducement to their executing the contract; and that they demanded that it be inserted in the paper, and Wilder told McElevee to insert it, and that McElevee read the paper as though it had been incorporated in it. Several of the parties who were present at the time the contract was entered into deny that any such promises were made, and deny that Wilder or McElevee assumed to insert such a clause in the contract.

These witnesses who sustained Wilder and McElevee, in their positive denial, were called to testify by complainants. They were friends and neighbors of complainants, and presumably disposed to favor them. It is incredible that such

promises were made, and were acted on by complainants as their main inducement to the trade. They say that the railroad was to have been built in three, or, at most, in five years, yet they allow ten years to elapse before they make complaint or demand of defendant company. The paper in which they say they supposed the promise had been writtten they knew was by Wilder left in the possession of Esq. Blair, their neighbor and friend, and yet never asked to inspect it, although several years afterwards they were told by Blair that he did not think any reference was made to the railroad in it, and invited them to come to his house and inspect it.

What was said with reference to the railroad, as we gather from the proof, is that, in response to inquiry as to how the ore would be transported, Wilder told them that it would be by rail to the river, and thence by boat, connecting with the railroad of the defendant on the other side; and we doubt not but that Wilder did descant, perhaps, in glowing terms, upon the advantages to follow upon the introduction of a railroad into that country. The complainants lived in the neighborhood. They knew the railroad was not being built, yet they murmured not. Moreover, in 1879, complainants J. A. and J. M. Barnard, as executors of their deceased father, Jonathan Barnard, sold the fee in the lands of which the iron ore had been sold to the defendant company to one W. D. Baywell and wife; and in their deed to Baywell they made the following reservation: "With the exception of the iron ore, which is deeded to the Roane Iron Company, with timber for beaming purposes and ways to it, which was deeded by the said Jonathan Barnard in his life-time." If short of an estoppel, it is certainly persuasive evidence of an acquiescence, as late as 1879, so far as their father's lands were concerned.

As to the inadequacy of price, it is true that one witness is produced who says that the lands are worth $1,000 per acre, and says he is a mineralogist, and undertakes to speak as an expert; but, without questioning his good faith, we regard

his evidence as unreliable,—as theoretic and speculative. Another witness called by the complainants, says the iron ore lands he regards as now worth from $60 to $120 per acre, but he does not say what they were worth in 1872 or 1873. He says he has lately bought a half interest in 200 acres of ore lands, within two and one-half miles of the land in question, for $300, which is at the rate of $3 per acre. He further shows that such lands are worth more now than they were in 1873; so that we fail to find such inadequacy, if any, as would supplement the other proof of fraud claimed by the complainants.

We fail to find any satisfactory proof of misrepresentation as to the kind or character of iron ore which Wilder was undertaking to purchase.

We find nothing in the paper executed by Wilder on the day the title bond was executed which justifies the contention of complainants that it empowers them to now demand a reconveyance of the property because of the non-user of the mine. The language is, with reference to the reconveyance, as follows: "If the Roane Iron Company decides that they *cannot* or *will not* mine or use the same," etc. The response of the defendant is that they *can* and *will* mine and use the same when they need it, of which they are to be the judge.

But if there was any doubt as to our conclusions on the facts of the case, it is difficult to see how the complainants could obtain relief, after their long acquiescence, with no satisfactory explanation of the delay. In the language of Judge TURLEY in the case of *Peck* v. *Bullard*, 2 Humph. 41, "the proof is not satisfactory as to the existence of a fraudulent intent on the part of defendant; but, if it were, we are of opinion that the great length of time complainant has slept upon his rights, precludes him from now asking the aid of a court of chancery." To the same effect see *Knuckolls* v. *Lea*, 10 Humph. 577; *Scott* v. *Johnson*, 5 Heisk. 636. This

doctrine is particularly applicable to speculative property, like that here in question, which is liable to large and frequent fluctuations in price. *Grymes* v. *Sanders*, 93 U. S. 62. The peace and repose of society requires the enforcement of this rule, and it is not to be relaxed, except in very extreme cases, and where the delay is satisfactorily accounted for.

The decree of the chancellor will be reversed, and bills dismissed, at the cost of the complainants in the respective causes.

FRITZLER ET AL. v. ROBINSON.

(70 Iowa 500; 31 N. W. 61. Supreme Court. Dec. 21, 1886.)

Where the case was tried below as an equitable action it will be reviewed as such in the Appellate Court, which implies a trial *de novo*.

Degree of proof to reform. To amend a contract the proof must be clear and convincing that it did not set forth the true intent of the parties and that the omissions occurred from oversight or mistake.

[1]**Where both parties believe coal to exist** but none is found, equity will relieve on the ground of total failure of consideration arising from mutual mistake.

Appeal from circuit court, Keokuk county.

Action on agreement for a lease of coal land. Judgment for plaintiff. Defendant appealed.

Plaintiff and wife, being owners and occupants of certain real estate, executed a coal lease therefor to the defendant in consideration of the payment of five cents per ton royalty for coal mined, or $300 per year providing the royalty did not amount to that sum, and also the right to have coal for home consumption. Plaintiff brought this action for the recovery of $300 for the first year, and $25 for failure to deliver coal for home use. Defendant answered, denying indebtedness, and setting up as an equitable defense that both parties at the time believed that there was coal under the land, but that it was subsequently ascertained that there was no coal; also that it was the intention of the parties to the lease, and intended to be written therein, that the defendant and his assignees should have the right to prospect on the premises for coal, and, if there was no coal, then no royalty was to be paid.

[1]*Bluestone Co.* v. *Bell*, 38 W. Va. 297; 18 S. E. 493. *Muhlenberg* v. *Henning*, 15 M. R. 423. *Hewitt Co.* v. *Dessau Co.* (Mich.) 89 N. W. 365. *Blake* v. *Lobbs Estate*, 110 Mich. 608. *Diamond Co.* v. *Buckeye Co.* 70 Minn. 500.

Defendant asks that the contract be reformed to agree with such intention. The answer also recites that it was understood between the parties that the lease should be assigned to the Novelty Coal Company; that it was given and received with that understanding, and was so assigned. Judgment for plaintiff for damages assessed at $347.40. Defendant appeals.

MACKEY & FONDA, for appellant.

SAMPSON & BROWN, for appellees.

ROTHROCK, J. A question is raised as to the manner in which this cause is to be tried in this court,—whether upon errors, or *de novo* on the evidence, which has been reduced to writing.

It appears from the record that the whole of the evidence was reduced to writing on the hearing, which was had before the court, and by an order entered in the case, the evidence was taken down by the official shorthand reporter, was made a part of the record, and on the evidence then introduced, the case was taken under advisement to be argued in vacation, and judgment and decree entered in vacation. This order was made at the March term, 1885; both parties being present. At the September term of the same year the cause was continued by consent, for the reason, as stated in the order, that the record had not been submitted to the court.

At the term held in February, 1886, the cause was resubmitted and taken under advisement, judgment and decree to be entered in vacation. It is apparent from the record that the cause was tried below as an equitable action, and it must be so tried here. *Van Orman* v. *Merrill*, 27 Iowa, 476; *Balch* v. *Ashton*, 54 Iowa, 123, 6 N. W. 146; *Richmond* v. *Dubuque & S. C. R. R.* 33 Iowa, 422; *Blough* v. *Van Hoorebeke* 48 Iowa, 40. The evidence having been certified as required by law, we

shall therefore proceed to consider the case as trialable *de novo* in this court.

The appellant insists that the court erred in sustaining a motion to strike out a part of an amendment to the answer, but a careful examination of the pleading convinces us that the portion struck out might be regarded as redundant; and we think the motion was properly sustained.

The first branch of the equitable defense set up by the defendant is that the contract in question does not express the true intent of the parties, but that the design was to put into the agreement "that defendant, or his assignees, should have the right to prospect said land, and see if there was any coal thereunder, and, if it was proven there was not, there should be no royalty or money paid;" that this was the intention at the time the contract was made, but that it was "omitted from the written agreement by mistake or oversight. Defendant therefore asks that the written agreement or conveyance be reformed so as to express the real intent of the parties at the time as indicated above." It is an old and well-established rule that, before a court can disturb the provisions of a written agreement for the purpose of reforming it, there should be clear and convincing evidence (1) that the written instrument did not, at the time of its execution, set forth the true intent of the parties; (2) that the failure to make the instrument express such intent arose from oversight or mistake in drafting the instrument.

It does not seem to us clear from the evidence that there was any intent, at the time of the execution of the writing, that any such provision, as claimed by defendant, was intended to be inserted. On the contrary, all the negotiations proceeded in the belief that there was coal on the premises, and the writing was drawn in accordance with such negotiations. There was not sufficient evidence to warrant the court in disturbing the provisions of the contract.

It appears very clear, however, from the evidence, that the lease or conveyance was executed, delivered, and received under the belief that there was coal underlying the premises, and that the same could be mined. It is equally clear from the testimony that there is no coal there. The lease was therefore entered into by the parties through a material honest mistake of fact, of vital importance to the validity of the contract. Both parties were dealing in regard to something they supposed to be in existence so far as either had any knowledge. Against such a mistake equity will grant relief. 1 Story, Eq. Jur. 142–144; *Allen* v. *Hammond*, 11 Pet. 71; 2 Kent, Comm. (10th Ed.) 643. There being, therefore, a total failure of consideration arising out of mutual mistake, the plaintiff is not entitled to recover of the defendants.

Reversed.

[1]ARGENTINE MINING CO. v. TERRIBLE MINING CO.

(122 U. S. 478. Supreme Court. May 27, 1887.)

Waiver of Replication. A new party having been substituted in the case, amended complaint and answer substantially the same as the original were thereupon filed but no new replication was filed. Trial was had without objection on this point: *Held* that it was too late to be taken advantage of in the Appellate Court.

The refusal of instructions though sound in law becomes immaterial when the jury find the facts upon which they were predicated against the party asking them.

When there are surface outcroppings from the same vein within the boundaries of two claims, the one first located necessarily carries the right to work the vein.

[2]**When a mining claim crosses the course of the lode** or vein instead of being "along the vein or lode," the end lines are those which measure the width of the claim as it crosses the lode; and thus the lines which separate the locations of the parties in this case are end lines across which, as they are extended downward vertically, the defendant cannot follow a vein, even if the apex or outcropping is within its surface boundaries.

[3]**An earlier location though its survey lies across** instead of with the strike will hold all the vein within its lines against a later location on the same vein.

Error to the Circuit Court of the United States for the District of Colorado.

The following is the statement of the case made by the court.

This is an action to recover certain mining ground, being part of what is known as the Adelaide Lode in Lake County, Colorado, lying within the California Mining District. It was originally brought in the name of Frederick S. Van Zandt, who

[1]Part of the litigation below over same property is found in *VanZandt* v. *Argentine Co.* 4 M. R. 441; 7 Id. 634. *Terrible Co.* v. *Argentine Co.* 80 Fed. 853.

[2]*King* v. *Amy Co.* 18 M. R. —.

[3]The text is not the initial case to hold that no extralateral rights belong to a claim whose discovery vein crosses both side lines: that was the *Flagstaff case* which it cites.

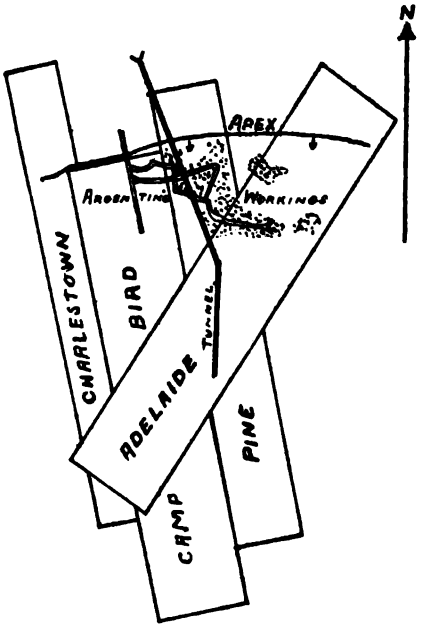
But it is the leading case of the converse of the proposition, to wit: that such a location or patent owns all of the vein which it encloses between its vertical planes, against any later location.

It is true that the defending lode, the Pine, was in no better situation as the plat shows that its location was also across the strike of the vein; but

claimed to be the owner of the lode. Subsequently he transferred his interest to a corporation, created under the laws of New York, known as the Terrible Mining Company, and by consent of parties that company was substituted as plaintiff in the action. To the original complaint an answer was filed by the defendant, the Argentine Mining Company, a corporation created under the laws of Missouri, to which a replication was made. To the complaint, amended by the substitution of the Terrible Mining Company as plaintiff, a new answer, substantially the same as the one to the original complaint, was filed, but it does not appear from the record that any replication was made to it. The parties seem to have considered the replication to the original answer as sufficient, for the trial was had without any reference to this omission. Its

following the text case in *Last Chance Co.* v. *Tyler Co.* 18 M. R. —. the same court extends the same ruling and protects the prior location against a claim patented on the strike which did have extralateral rights.

The following plat shows the situation of both claims as to the apex and the ore bodies.



absence cannot be made in this court, for the first time, a ground of objection to the subsequent proceedings. Nor do we consider counsel of the plaintiff in error as making any point upon the omission, although he calls our attention to it.

The plaintiff below, defendant in error here, is the owner of the Adelaide mining claim. The defendant below, plaintiff in error, is the owner of three other mining claims, called, respectively, the "Camp Bird," the "Pine," and the "Charlestown" lode claims. All these claims lie in the same mining district. The Adelaide claim was located in 1876. The other claims were located in 1877. The Adelaide claim occupies on the surface longitudinally a northeast and southwest direction. The Pine, Camp Bird, and Charlestown claims occupy a position nearly north and south, with end lines practically east and west, thus crossing diagonally the Adelaide claim. During the summer of 1880, the defendant below carried its mining operations through its own ground into the Adelaide claim, and it justifies its action in this respect by asserting that in doing so it followed a vein which has its outcrop, or apex, within the surface of its own locations. It cites Section 2322, Revised Statutes, in support of its position. That section provides that locators of mining claims previously or subsequently made, on any mineral vein, lode, or ledge on the public domain, to which no adverse right existed on the 10th of May, 1872, "so long as they comply with the laws of the United States and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as

to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

And the defendant requested the court to instruct the jury as follows:

"The law provides that upon a location properly made the claimant shall have the vein upon which the location is made and all other veins and lodes having their top or apex in the territory within the lines of the location, and not only within the body of the claim within the lines of the location, but beyond those lines as far as the vein or lode may, in its descent into the earth, pass beyond those lines and within the end lines of the location.

"The defendant here claims that the lode in controversy originates in its patented territory, by its top or apex, and descends upon its dip through and under the ground in controversy. If, from the preponderance of evidence you believe that the top or apex of the lode in controversy does, in fact, originate within the patented territory of the defendant and descends upon its dip into the ground in controversy, your verdict should be for the defendant."

This instruction the court refused to give, and the defendant excepted.

The court instructed the jury substantially as follows: That a statute of the state requires that the discoverer, before filing a location certificate shall first locate his claim by sinking a discovery shaft upon the lode to a depth of at least ten feet from the lowest part of the rim of the shaft at the surface, or deeper if necessary, to show a well-defined crevice; 2d, shall post at the point of discovery on the surface a plain sign or notice containing the name of the lode, the name of the

locator, and the date of the discovery; 3d, shall mark the surface boundaries of the claim by six substantial posts; that to recover a mining claim the plaintiff must show a good location in compliance with this statute, and that means "that he shall show in his discovery shaft a vein or lode of valuable ore in rock in place;" that the miner is not bound to make the first shaft or opening which he may sink his discovery shaft; he can make any one he may sink such shaft, only he must have in it a lode or vein. It is not sufficient for him to find mineral which would yield something, in a fragmentary condition, in the slide or loose tuff on the surface of the mountain, but he must find it within enclosing rocks in the general mass of the mountain; and that the question here is, whether the parties who made the Adelaide location found such a lode or vein in what they denominated the discovery shaft or opening, and that this was a matter to be determined by the jury; and if they find that the locators made such a discovery, the next question was, whether the vein extended to the point in dispute, and that the location was valid only to the extent of the lode included within it. The court added: "The question turns upon the validity of the Adelaide location. As I have explained it to you, if you believe it to be a valid location, well made according to the law as given in the statute, you will find for the plaintiff. If you think it was not so made, you will find for the defendant." To this charge the counsel of the defendant excepted, pointing out the particulars to which he objected. Upon the argument before us, he adhered to his exception to the closing part of the charge, because it was not accompanied by the further instruction, "that if the jury believe from the evidence that the location of the Adelaide claim was made upon the dip of a vein or lode whose top or apex was then in and extended through the patented territory of the defendant, such location of the Adelaide claim would, to the extent that it was on the dip of said vein whose top or apex was so in the defendant's patented territory, be invalid."

The jury rendered a verdict for the plaintiff, upon which judgment for the possession of the demanded premises was entered, and the defendant has brought the case to this court for review.

Mr. WALTER H. SMITH, for plaintiff in error, Mr. A. T. BRITTON and Mr. A. B. BROWNE were with him on the brief.

No appearance for defendant in error.

Mr. JUSTICE FIELD, after stating the case as above, delivered the opinion of the court as follows:

The instruction, as requested by the defendant, as a proposition of law is undoubtedly sound. It is substantially a brief repetition of the language of the statute. Its refusal, however, did not prejudice the defendant, for a valid location, as defined by the court, could only be found in favor of the plaintiff in case the vein discovered by the locators of the Adelaide claim extended to the ground in dispute. If such were the fact, the principle involved in the instruction asked, applied to that claim, cut off the right asserted by the defendant. If there was an apex or outcropping of the same vein within the surface of the boundaries of the claims of the defendant, that company could not extend its workings under the Adelaide location, that being of earlier date. Assuming that on the same vein there were surface outcroppings within the boundaries of both claims, the one first located necessarily carried the right to work the vein.

But there are other grounds equally conclusive against the contention of the defendant below. The instruction asked assumes that the longest sides of its claim were their side lines. Such would, undoubtedly, be the case if the locations of the claim were along the course or strike of the lode. The statute undoubtedly contemplates that the location of a lode or vein claim shall be along the course of the lode or vein. Its language is: "A mining claim located after the 10th day of May, 1872,

whether located by one or more persons, may equal, but shall not exceed, fifteen hundred feet in length *along the vein or lode;* but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th day of May, 1872, render such limitations necessary. The end lines of each claim shall be parallel to each other." Rev. Stat., § 2320.

When, therefore, a mining claim crosses the course of the lode or vein instead of being "along the vein or lode," the end lines are those which measure the width of the claim as it crosses the lode. Such is evidently the meaning of the statute. The side lines are those which measure the extent of the claim on each side of the middle of the vein at the surface. Such is the purport of the decision in *Mining Co.* v. *Tarbet*, 98 U. S. 463. (The *Flagstaff* case, 9 M. R. 607.) The court there said, referring to the statute of 1866, 14 Stat. 251, and that of 1872, 17 Stat. 91: "We think that the intent of both statutes is, that mining locations on lodes or veins shall be made thereon, lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable; and that the end lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction either way horizontally; and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of the vein, so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side

lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode." And again, that the end lines of the claim, properly so-called, are "those which are crosswise of the general course of the vein on the surface."

Such being the law, the lines which separate the location of the plaintiff below from the locations of the defendant are end lines, across which, as they are extended downward vertically, the defendant cannot follow a vein, even if its apex or outcropping is within its surface boundaries, and, as a consequence, could not touch the premises in dispute, which are conceded to be outside of those lines and outside of vertical planes drawn downward through them.

The defendant relied on the trial upon patents of the United States issued for its several claims, but those patents contain an exception which would also seem to exclude its pretensions. It is as follows, after the habendum clause: "excepting and excluding, however, all that portion of said surface ground embraced by mineral survey No. 254 of the Adelaide mining claim, and also, excepting and excluding all veins, lodes, or deposits, the tops or apexes of which lie inside the exterior lines of said Adelaide survey at the surface, extended down vertically, or which have been therein discovered or developed."

From a consideration of the whole case we are unable to perceive any error which would justify a reversal of the judgment below. It is accordingly

Affirmed.

RICHARD ASHMAN ET AL. v. R. B. WIGTON ET AL.

(12 Atlantic Rep. 74. Supreme Court of Pennsylvania. Oct. 3, 1887.)

Adopting gangway to be run, as division line. By written agreement defendants had the right to run a gangway over plaintiffs' land, and were entitled to all the coal on the northwest side of it. The route of the gangway was not definitely laid down, but was to be ascertained by survey after it was commenced. Defendants did run a gangway, and removed coal from the southern side of it, claiming a right under the agreement to run a gangway in such a direction as would entitle them to the coal so removed. *Held*, that the gangway actually constructed fixed the boundary of defendants' coal and that they had no right to any coal south of the south end of such gangway and of a line drawn at right angles to its general direction.

Removal of coal by surface occupant. Defendants, being in lawful possession of the surface of lands belonging to plaintiffs, removed coal from under the surface: *Held*, that they were liable as trespassers.

Error to Court of Common Pleas, Clearfield county; H. W. WILLIAMS, Judge.

This is an action of trespass *quare clausum fregit* brought by Richard Ashman and Loraine Ashman, executors of Mary Jane Ashman, deceased, and Ario Pardee against R. B. Wigton and William Dorris. The defendants had dug and removed coal from the plaintiffs' land, and claimed right to it under the following agreement: "Agreement made this twenty-seventh day of April, A. D. 1869, between Richard Ashman, of the village of Scottsville, county of Huntingdon, and state of Pennsylvania, and Mary Jane, his wife, of the one part, and R. B. Wigton and William Dorris of the other part, witnesseth, that the said Ashman and wife, for and in consideration of the benefit and advantage which the construction of the hereinafter mentioned railroad will be to the property belonging to them, and in further consideration of the

The lease of the shaft grants the right to work all the mining ground reached by the shaft. *Wesling* v. *Kroll*, 78 Wis. 636; 47 N. W. 943.

sum of one dollar to them in hand paid by the said Wigton & Dorris, the receipt whereof is hereby acknowledged, have agreed to convey, and hereby do convey, to the said Wigton & Dorris, their heirs and assigns, the right to make a railroad across or through a tract of land in Morris township, Clearfield county, and state aforesaid, surveyed on a warrant in the name of Christian Wirtz, Jr., either upon or under the surface or both, whichever will best develop the coal upon the lands adjoining in which the said Wigton & Dorris are interested, the said right of way to be sixty-six feet in width. Also the right to run a gangway, commencing at a point on Weiss Spring run, near where the present coal-shaft is sunk, near division line between Christian Wirtz and William Wirtz, thence running northeast to cross the tract aforesaid at water-level which route is to be ascertained by a survey after the gangway has been commenced; and the said Wigton and Dorris, their heirs and assigns, are to have and possess all the coal on the northwest side of gangway; and the said Ashman and wife, their heirs and assigns, to have and possess all the coal on the southeast side of said gangway; and the said Wigton & Dorris agree to convey to the said Ashman and wife, their heirs and assigns, their interest in as many acres on the northeast side of the gangway on the Philip Stone survey as the said Ashman and wife convey to the said Wigton & Dorris between the gangway and Weiss run on the Christian Wirtz, Jr., survey; and the said Ashman and wife agree to convey to the said Wigton & Dorris the surface of part of said tract in name of Christian Wirtz, Jr., on the northwest side of the gangway, extending to the division line between them and the tract in name of Philip Stone, not to exceed fifty acres, which tract is to be surveyed, and a deed to be executed for the same when desired, by the said Wigton & Dorris, their heirs and assigns," etc. Under this agreement defendants had entered into possession, in 1869, of the lands in question, and had continued in possession until action brought. The

shaft referred to in the agreement as "the present coal-shaft," etc., "near division line between Christian Wirtz, (Jr.,) and William Wirtz," was located near the point designated on the plan as "No. 6 Mine," and defendants claim the right to run a gangway commencing at this point in the direction indicated in the agreement, and that all the coal northwest of such a line belongs to them. No such gangway has been run, but one was commenced at a point 850 feet east of north from where Weiss Spring run crosses the division line between the Christian Wirtz, Jr., and William Wirtz tracts, (near which point the gangway was to start under the agreement,) and was run in a northeasterly direction through the Weiss farm. This gangway is designated upon the plan as "No. 1 Mine," from which a heading was turned off to the right; work in which heading being drowned out by water, the "monkey-drift" was commenced at a point 125 feet south of the mouth of No. 1 mine, and run nearly parallel to the heading, until opposite to the place where the water had accumulated, when the water was drained off through the heading known as the "airway." In the court below a verdict was rendered for the plaintiffs for "the coal taken out in the construction of the monkey-drift and rooms south of the heading of No. 1 mine." Both parties bring error.

McENALLY & McCURDY and W. H. WOODS, for plaintiffs.

ORVIS & SNYDER and MURRAY & GORDON, for defendants.

The boundary between plaintiffs' and defendants' coal was the gangway. The starting point of the gangway and its course being designated by the agreement, the boundary was determined. *Hagey* v. *Detweiler*, 35 Pa. St. 409, 413; *Flagg* v. *Thurston*, 13 Pick., 145. Defendants were entitled to all the coal lying northwest of this boundary, and the location of another gangway would not abridge this right, unless there

was a clear intention that it should do so. The defendants have continually asserted their right to this coal. The contract will not be construed so as to work a forfeiture. *Newman* v. *Rutter*, 44 Pa. St., 51; *McKnight* v. *Kreutz*, 50 Pa. St., 232; *Helme* v. *Insurance Co.*, 61 Pa. St., 107. Defendants being in possession under contract with plaintiffs, trespass does not lie. *Boults* v. *Mitchell*, 15 Pa. St., 371; *Narehood* v. *Wilhelm*, 69 Pa. St., 64; *Berkey* v. *Auman*, 91 Pa. St., 481.

GORDON, C. J. The principal controversy in this case—the only one that we need specially notice—is that arising on the answer of the court below to the fourth point of the plaintiffs below, which point and answer are as follows: "The defendants had no right to the coal in those portions of the land belonging to Mrs. Ashman or to Ashman and Pardee, which were south or east of said gangway. *Answer.* If by these words 'south or east of said gangway' is meant the southeast side of the gangway, we affirm this point. The contract provided for the division of the warrant for mining purposes upon the line of the gangway from the present coal-shaft near the division line between Christian Wirtz, Jr., and William Wirtz; the coal on the northwest of this line belonging to defendants, and to be paid for by a conveyance of an equal amount of coal land from Philip Stone, on the northeast side of the line, to the Ashmans. This is a fair and reasonable arrangement, adopted to advance the interests and suit the convenience of both parties to the contract."

It will be observed that in the construction of the agreement of the twenty-seventh of April, 1869, the court adopted, not the gangway itself, but the line of the gangway or drift extended to the southern boundary of the tract, as the true division of the coal between the contestant parties. In this we are constrained to dissent from the conclusion thus adopted by the learned judge. The contract referred to reads in this manner: "Also the right to run a gangway, commencing

at a point on Weiss' Spring run, near where the present coal-shaft is sunk, and near the division line between the Christian Wirtz and William Wirtz, thence running northeast to cross the tract aforesaid at water-level, which route is to be ascertained by a survey after the gangway has been commenced. And the said Wigton and Dorris, their heirs and assigns, are to have and possess all the coal on the northwest side of said gangway; and the said Ashman and wife, their heirs and assigns, to have and possess all the coal on the northeast (southeast) side of said gangway." From the above it will be observed that what the parties had mainly in view was not a line, but a drift or gangway, to begin near a certain coal-shaft, and to run across the Christian Wirtz tract. The direction mentioned was evidently not specific, but approximate only; for the line was to cross the tract at water-level, and to be ascertained after the gangway had been commenced, so, as the water-level could not be ascertained until after the gangway was commenced, necessarily its direction could not be known until after that event. Moreover, a strict water-level could not be followed; otherwise the drift could not be drained, an element essential to its use. It follows that the direction, to a certain extent, must depend on the judgment of those employed by Wigton and Dorris to dig the gangway. But Wigton and Dorris were the parties to determine this matter, and when they had determined it, and had constructed the gangway, they also had determined and absolutely fixed the line between themselves and Mrs. Ashman; for they, Wigton and Dorris, "are to have and possess all the coal on the northwest side of said gangway, and said Ashman and wife to have and possess all the coal on the (southeast) side of said gangway." Nothing can be plainer than this: But one gangway was contemplated, and not, as the defendants contend, two or more, until they reached the water-level; and when that was constructed the rights of the parties, in respect to the coal, were definitely

fixed and settled. But if we are limited to the gangway we are not permitted to extend the line of it south of its commencement, for we would thus abandon the true line fixed in the ground; and in that event we might as well adopt the logic of the defense throughout. This, however, the court below properly refused to do, but seems to have overlooked the fact that if the gangway was to be adopted as the true partition line it must needs be adopted throughout —must start where it begins and stop where it ends; we must have regard not only to the line but to its corners. It follows that the defendant had no right to the coal south of the south end of the gangway and of a line drawn at right angles to its general direction and extending to the western line of the tract.

As to the contention of the defendants on their writ of error that, as they were in possession of the premises, the action of trespass cannot be sustained, we have but to say the only lawful possession they had of the land east and south of the gangway was of the surface; but, as the coal and surface were distinct estates, their possession of the latter gave them no right whatever in the former; hence their intrusion into the plaintiff's coal rendered them trespassers.

The judgment in the first-stated writ of error, Richard Ashman et al. v. *R. B. Wigton et al., is reversed, and a new venire ordered. The judgment as to the second writ is affirmed.*

PAXSON, J., absent.

NEW YORK AND COLORADO MINING SYNDICATE & COMPANY v. ROGERS.

(11 Colorado 6; 16 Pac. 719; 7 Am. St. Rep. 198. Supreme Court. January 27, 1888.)

[1]**In a negligence case where the evidence is conflicting** and the result left to the jury the court will not disturb their finding.

Frozen rope. Letting bucket go. Where the evidence showed that the hoisting bucket was a half barrel lowered with a frozen rope without a pin, or if fastened with a pin, insecurely fastened, so that the bucket fell from the rope, and the unsafe condition of the tackle was known to the defendant, a case of negligence is made out.

[2]**Recent admission by agent.** The foreman in charge immediately, or within a very short period. after the accident, stated that "in the morning he would have it fixed safe": *Held,* that this evidence was properly admitted as part of the *res gestae.*

Appeal from District Court, Chaffee County.

This action was brought by plaintiff, Rogers, to recover damages for physical injuries suffered while in the employ of the appellant company. Rogers, being a carpenter, was cribbing at the bottom of a shaft some 50 feet in depth. Tools and materials of various kinds for the work were lowered to him by means of a windlass and bucket. The bucket became detached from the rope to which it was fastened, and fell or slid, the shaft not being exactly perpendicular, to the bottom, striking plaintiff upon the head and legs, and bruising other parts of his body. The injuries were severe, but in the course of three or four weeks he recovered sufficiently to do light work. The cause was tried to a jury, resulting in a verdict and judgment for plaintiff in the sum of $300. From that judgment the present appeal is taken. The remaining facts sufficiently appear in the opinion.

[1]*Deserant* v. *Cerillos Co.* 178 U. S. 409. *Sampson Co.* v. *Schaad,* 17 M. R. 362.

[2]Otherwise as to stale admissions. *Wilson* v. *Dunreath Q. Co.* 77 Iowa 429; 42 N. W. 360.

M. B. CARPENTER, for appellant.

No appearance for appellee.

HELM, J., (*after stating the facts as above.*) The ground of recovery upon which plaintiff below relied was negligence on the part of defendant in not furnishing and maintaining safe machinery or appliances for the work in which he was engaged. The rule upon this subject is familiar. It will be found sufficiently stated in *Wells* v. *Coe*, 9 Colo. 159, 11 Pac. 50.

As to the defective condition of the appliance in use, and the negligence of defendant in connection therewith, the evidence is conflicting. The witnesses upon this question offered by the respective parties are about equal in number, and, where conflicts occur, the jury undoubtedly accepted the testimony of those produced by plaintiff. Such election of the jury will not be questioned by us.

Bearing this in mind, we turn to the testimony, and find that the bucket supplied was large, being the half of a barrel which had been sawed in two in the middle; that it was detached from the rope when hoisted, and reattached upon lowering; that about eight feet of the lower end of the rope in use had been wet, and was frozen stiff, so that it could with great difficulty be fastened to the bail of the bucket; that this rope was adjusted at the time of the accident in the usual manner, that is, in the way the men were in the habit of making the fastening. There is conflict as to whether a "pin" was furnished, and as to whether the frozen rope could have been passed through the loop in the bail so as to use a pin, had there been one; also as to whether specific orders were given concerning the manner of fastening the rope to the bail. It appears that the foreman had previously given instructions to have the frozen part of the rope cut off, and apparatus substituted so as to make the connection more

secure; likewise that, immediately after the accident, this was done by making a knot, the frozen end being removed, and the foreman remarking that "in the morning he would have it fixed safe." Within 36 hours, a chain with an open link and proper accessories were furnished and in use. We think the jury were justified in finding the appliance in question unsafe; also that defendant had knowledge of its condition at least two weeks before the accident. We cannot say that the jury should have charged plaintiff with contributory negligence. This question was fairly submitted to them, and we must presume that they considered it. Therefore, unless error was committed in receiving evidence, or in charging the jury, the judgment should not be disturbed.

But it is argued by counsel for appellant that there was error in admitting proof of the foreman's declaration as to the unsafe condition of the connecting appliance furnished. No doubt exists about the making of the statement, for the foreman admits it. Counsel's position is that, being made after the injury, it should have been regarded as hearsay, and rejected. According to the testimony of one witness, the declaration was made about 30 minutes after plaintiff was hurt; another witness declares that it was made "just after the accident," but admits on cross-examination that it might have been "half an hour after;" while the foreman himself, who was defendant's witness, says it was "immediately after the accident." The foreman was defendant's agent in charge of the mine, and was upon the ground when plaintiff was injured. He proceeded at once to the shaft, and directed the employes to fix the appliance in question. His remark was called forth by the accident, and was uttered while giving instructions with reference to that which plaintiff claims was its cause. His good faith towards defendant, and devotion to its interests, are unquestioned. His purpose in the changes ordered was undoubtedly to remove danger, and prevent repetitions of similar injuries in the future. He

was acting directly in the line of his duty, and for the time being stood in the shoes of his principal. The main facts under investigation by the jury upon the trial were the accident and its cause. The declaration in question was not an idle statement, wholly disconnected from the principal fact. It tended to throw light upon the circumstances attending the injury, including the cause thereof, and to illustrate its character. We shall hold that there was no abuse of the "sound discretion" lodged with the court in admitting it as a part of the *res gestae*.

It is not necessary to discuss the specific assignments of error relating to the charge. Each of defendant's instructions refused was defective in one or more important particulars, and should not have been given. Considered as a whole, the charge is not obnoxious to the objections urged in argument.

The judgment is affirmed.

THE GLACIER MOUNTAIN SILVER MINING CO. v. J. FRANK WILLIS ET AL.

(127 U. S. 471. 8 Sup. Ct. Rep. 1214. Supreme Court. May 14, 1888.)

Sufficient description of tunnel site. In an action to recover a mining claim, the complaint, after setting forth the location by plaintiff's grantors of a tunnel and tunnel site in Snake River mining district, Summit county, Colo., at the base of the Glacier mountain, stated that said grantors caused to be made out and recorded a location certificate of said tunnel claim, describing the location and boundaries thereof; that the said tunnel claim was, by its locators, named the "Silver Gate Tunnel Claim," and is described more fully as follows: "Commencing at the base of said Glacier mountain east of Bear creek, and running southeast and parallel with Coley tunnel, through said mountain, 5,000 feet from the mouth or starting point of said tunnel, at a stake marked and in or at the mouth of said Silver Gate tunnel, and 250 feet northeast, and 250 feet southwest, from said stake or tunnel, to its termination." *Held*, on demurrer, that the description was sufficient.

Lodes not separately described. Although the lodes alleged to be embraced within the tunnel-site location are not each separately described, the statement in the complaint, that all the lodes in the tunnel claim have been worked and mined by plaintiff and its grantors, comprehends every part of the property for the recovery of which the action is brought.

[1]**Title under statute of limitations.** The allegation in the complaint that a valid and legal location of the tunnel was made by persons under whom plaintiff claims, and that plaintiff had held possession of the same for more than five consecutive years prior to the ouster by defendants, and paid all the taxes assessed during that period, shows a right in plaintiff to the premises in dispute, under the laws of Colorado, superior to any other claims except that of the government.

Locations prior to Act of 1872. 5,000 foot tunnel. All mineral locations are to be governed by the local rules and customs in force at the time of the location, when such location was made prior to the passage of any mineral law by congress. Hence, although Rev. St. U. S. § 2323, gives the right to locate a tunnel 3,000 feet only from the face thereof, the location of a tunnel 5,000 feet in length, made prior to the enactment of that law, in accordance with local rules and customs, is valid.

Error in the Circuit Court of the United States for the District of Colorado.

[1]On the question whether under R. S. § 2332, a plaintiff in a suit supporting an adverse claim could recover on his possession alone during the Statutory Limitation period, or a defendant plead the same as a defense,

This was a writ of error to the Circuit Court of the United States for the district of Colorado to review a judgment of that court sustaining a demurrer to the "second amended complaint" filed by the Glacier Mountain Silver Mining Company, plaintiff in error, against J. Frank Willis, Charles Buckland, and Donald M. Frothingham, defendants in error, which complaint is in the words and figures following, to-wit: "For second amended complaint the plaintiff complains and alleges that it is a corporation organized and existing under the laws of the state of Ohio, and is a citizen of the state of Ohio; that the defendants are and each of them is a citizen of the state of Colorado; and that the property in controversy exceeds the value of $500. Plaintiff further alleges that on the 21st day of June, 1865, one Joseph Coley and one George C. Reeves, each being a citizen of the United States, went upon the public domain of the United States theretofore wholly unoccupied and unclaimed, and located, on said day, a tunnel and tunnel site at the base of Glacier mountain, in Snake River mining district, county of Summit, state of Colorado. That afterwards, and on the same day, they marked the boundaries of their said location, and commenced to run a tunnel into said Glacier mountain, and, after fully complying with the laws of the United States, the laws of the state of Colorado, and the local rules and regulations of the said Snake River mining district, they caused to be made out and recorded in the recorder's office of the county of Summit, aforesaid, a location certificate of said tunnel claim, which said certificate described the location and boundaries of said tunnel claim. That, from the day of said location until the ouster hereinafter set forth, the said locators of said tunnel claim and their grantees remained continuously in

this case would seem to be controlling. The same ruling is made in *Gr. M. Co.* v. *Bullion Co.* 1 M. R. 114, and *Altoona Co.* v. *Integral Co.* 114 Cal. 100; 45 Pac. 1047. But to the contrary is *McCowan* v. *Maclay*, 16 Mont. 234; 40 Pac. 602, and *Cleary* v. *Skiffich*, 28 Colo. 362; 65 Pac. 59.

possession of said tunnel claim, working and mining thereon, and have expended thereon more than the sum of $5,000. That the plaintiff is the owner of the said tunnel claim, above described, by location and purchase, and is now entitled to the quiet and peaceable and exclusive possession thereof, by virtue of a full compliance on its part, and on the part of its grantors, with the laws, rules, and customs above set forth; that the plaintiff and its grantors have been in the peaceable and undisputed possession of said tunnel claim, by virtue of such location, occupation, pre-emption, and record, for more than five years prior to the ouster hereinafter complained of. That plaintiff and its grantors, for more than five consecutive years prior to the acts of the defendants hereinafter mentioned, paid all taxes legally or otherwise assessed upon said tunnel claim, and have worked and mined the same from said 21st day of June, 1865, up to the time of the acts of the defendants hereinafter set forth. That the said tunnel claim, so located, embraces many valuable lodes or veins which have been discovered, worked, and mined by the plaintiff and its grantors. That the said tunnel claim was by its locators named the 'Silver Gate Tunnel Claim,' and is described more fully as follows: Commencing at the base of said Glacier mountain east of Bear creek, and running southeast and parallel with Coley tunnel, through said mountain, five thousand feet from the mouth or starting point of said tunnel at a stake marked and in or at the mouth of said Silver Gate Tunnel, and two hundred and fifty feet northeast, and two hundred and fifty feet southwest, from said stake or tunnel, to its termination. Said tunnel site is situate on Glacier mountain, in Snake River mining district, county of Summit, and state of Colorado, and is five thousand feet in length by five hundred feet in width. Plaintiff further alleges that, while it was in the quiet and peaceful possession of said tunnel claim, and every part thereof, the defendants, wrongfully and without right and without

consent of the plaintiff, to-wit, on or about the 2d day of July, 1883, entered upon the premises, and into said tunnel, so run by plaintiff and its grantors on said claim, and wrongfully and unlawfully ousted the plaintiff therefrom, claiming the said tunnel as the War Eagle. That, on or about said last-mentioned date, the defendants, without right, made a pretended location of a lode claim across said tunnel, and within said tunnel claim, and therein wrongfully ousted the plaintiff therefrom, claiming that they had discovered a lode which they called the 'Tempest Lode.' That the defendants have ever since hitherto unlawfully and wrongfully withheld the possession of the said premises and tunnel claim from the plaintiff, to its damage in the sum of $1,000. Wherefore plaintiff demands judgment against the defendants (1) for the recovery of the possession of said Silver Gate tunnel, tunnel site, and claim; (2) for the sum of $1,000 damages for the wrongful withholding thereof; (3) for costs of suit." The demurrer of the defendants rested upon four grounds: "(1) That the property sought be recovered in this action is not described by its legal subdivisions, nor by its metes and bounds; (2) that the lodes alleged to be embraced within the said tunnel-site location, and for which a recovery is asked by the said plaintiff, are not mentioned nor described, nor any location of them, or any of them, alleged; (3) that said complainant does not show any valid and legal subsisting pre-emption or location of said Silver Gate tunnel site; (4) that the claim of the said plaintiff to a strip of ground 5,000 feet in length, by 500 feet in width, as a tunnel site, is unwarranted and unprecedented, and was not, at the date of said pretended location, nor at any time subsequent thereto, authorized by any local, state, or congressional law." * * *

WALTER H. SMITH and E. C. FORD, for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE LAMAR, after stating the case as above reported delivered the opinion of the court.

The opinion of the court below is not found in the record, and we are not advised, by brief or otherwise, as to the grounds upon which the court sustained the demurrer. We must therefore determine the issues presented in the case by reference to the bill of complaint, and to the causes assigned for demurrer.

First. That the property sought to be recovered in this action is not described by its legal subdivisions, nor by its metes and bounds. We do not think this ground is tenable. The complaint, after setting forth the location by plaintiff's grantors of the tunnel and tunnel site in Snake River mining district Summit county, Colo., at the base of the Glacier mountain, states that they (said grantors) caused to be made out and recorded in the recorder's office of the county aforesaid, a location certificate of said tunnel claim, which said certificate described the location and boundaries of said tunnel claim; that the said tunnel claim was by its locators named the "Silver Gate Tunnel Claim," and is described more fully as follows: "Commencing at the base of said Glacier mountain east of Bear Creek; and running southeast and parallel with Coley tunnel, through said mountain, five thousand feet from the mouth or starting-point of said tunnel, at a stake marked and in or at the mouth of said Silver Gate tunnel, and two hundred and fifty feet northeast, and two hundred and fifty feet southwest from said stake or tunnel, to its termination." We think this description is sufficiently plain and distinct to enable the sheriff, in case of a recovery, to execute a writ of possession, or to enable a surveyor to ascertain the exact limits of the location. The strict rule of pleading which formerly required exact accuracy in the description of premises sought to be recovered, has, in modern practice, been relaxed, and a general description of the property held to be good. The provisions

of state statutes, as to the description of the premises by metes and bounds have been held to be only directory; and a description by name, where the property is well known, is often sufficient.

As to the second cause of demurrer, we think that, though the lodes alleged to be embraced within the said tunnel-site location are not each separately described, the statement in the complaint, that all the lodes in the tunnel claim have been worked and mined by the plaintiff and its grantors, comprehends every part of the property for the recovery of which the action is brought.

With reference to the third ground of the demurrer, it is only necessary to say that the complaint alleges that a valid and legal location of said tunnel was made by persons under whom the plaintiff claims, and that the plaintiff held possession of the same for more than five consecutive years prior to the ouster by the defendants, and paid all the taxes during that period legally or otherwise assessed upon said property. This, under the laws of Colorado, would give the plaintiff a right to the premises in dispute superior to any other claim, except that of the government.

The fourth ground of the demurrer is: "That claim of the said plaintiff to a strip of ground 5,000 feet in length, by 500 feet in width, as a tunnel site, is unwarranted and unprecedented, and was not, at the date of said pretended location, nor at any time subsequent thereto, authorized by any local, state, or congressional law." Under section 2323, Rev. St. U. S., the right is given to locate a tunnel 3,000 feet from the face of said tunnel, and the right is also given to the lodes discovered in said tunnel, "to the same extent as if discovered from the surface," which is 300 feet on each side of the tunnel. Under the local laws of Colorado the right is given to: "250 feet each way from said tunnel, on each lode so discovered Section 1801, Gen. Laws Colo., p. 627. The objection presented by the demurrer is that the tunnel is 5,000 feet in length

whereas the statute only recognizes a right of 3,000 feet from the mouth thereof, and that this renders the whole claim void. We do not assent to this proposition. The location would be good to the extent of 3,000 feet at least. *Mining Co.* v. *Rose*, 114 U. S. 576, 580; 5 Sup. Ct. R. 1055. This would be true had the location been made under the mining laws now in force. It will be observed, however, that this location was made prior to the passage of any general mining law. It was made in 1865, and the first general statute passed by congress on the subject is that of July 26, 1866. It is alleged by the plaintiff in error that this location was made in accordance with the local rules and customs of miners in force at the time of the location, and that, therefore, such location was recognized and protected by the general mineral laws of July 26, 1866. (14 St. 251,) and that of May 10, 1872, (17 St. 91.) This allegation, however, is denied by the defendants; but, as these local rules and customs differ in the several mining districts as to the extent and character of the mine, the question cannot properly be determined on demurrer. The land department of the government, and this court also, have always acted upon the rule that all mineral locations were to be governed by the local rules and customs in force at the time of the location, when such location was made prior to the passage of any mineral law by congress. *Jennison* v. *Kirk*, 98 U. S. 453, 457; *Broder* v. *Water Co.* 101 U. S. 274, 276; *Jackson* v. *Roby*, 109 U. S. 440, 441, 3 Sup. Ct. R. 301; *Chambers* v. *Harrington*, 111 U S. 350, 352, 4 Sup. Ct. R. 428. We are therefore of the opinion that the cause of action is plainly and fully set forth in the complaint, and that the judgment of the court below cannot be sustained on any ground presented by the record. The judgment of the Circuit Court is therefore reversed, and the cause remanded to that court for such further proceedings as are consistent with this opinion.

So ordered.

ULMER ET AL. v. FARNSWORTH.

(80 Maine 500; 15 Atl. 65. Supreme Judicial Court. August 3, 1888.)

[1]**No implied contract to pay for.** *Assumpsit* cannot be maintained by the owner of a lime quarry against the owner of another quarry adjacent, but not adjoining, to recover compensation for pumping out water that accumulated in the latter, and ran through the intervening quarry into the former, no express promise of payment therefor being proved.

Usage, local and recent. Nor can the plaintiff recover upon an implied promise on the ground of usage or custom, when it appears that the alleged custom is local, recent in origin, and not uniform.

Limit to scope of usage. Evidence of a local usage may be received to modify a contract or explain the intention of the parties, in case of ambiguity, but not of itself to create a liability or establish a contract.

On report from Supreme Judicial Court, Knox County.

Assumpsit to recover compensation for services alleged to have been rendered for defendant's benefit. Plea, general issue.

O. G. HALL, for plaintiffs.

ROBINSON & ROWELL, for defendant.

DANFORTH, J. The plaintiffs are the owners of a lime quarry, in which they have a pump used for the purpose of draining their quarry from such water as may accumulate therein, whether coming from sources within its own limits or outside. The defendant owns another quarry adjacent to, but not adjoining, the plaintiffs, there being one quarry between them. It is alleged that water accumulates in the defendant's quarry, and, running through the one intervening, comes upon that of the plaintiffs, and is pumped up by them. It is to recover compensation for this service that this action is brought, the plaintiffs alleging that the defendant receives benefit

[1]Covenant to run a level to drain the mine held to run with the land. *Crawford* v. *Witherbee*, 17 M. R. 348.

from it, as it prevents the injurious accumulation of water in his own quarry. The action is *assumpsit* and must therefore be maintained, if at all, upon proof of a promise, express or implied. The case shows no sufficient proof of an express promise.

Nor will the facts proved, independent of the alleged custom or usage relied upon by plaintiffs, raise an implied promise. The pump by which the service was performed was situated in the plaintiffs' quarry, put there primarily for the purpose of draining their own premises. The running of the water from the defendant's quarry to the plaintiffs' was the result of the plaintiffs' own act in digging theirs deeper than the other. The benefit accruing to the defendant, if any, was merely incidental, with no legal right to interfere with the operation of the pump, and hence under no obligation to give notice of a denial of liability. These circumstances could not raise an implied promise on the part of the defendant—certainly not if he was guilty of no wrong in permitting the water to run as it did, and if he was guilty the remedy would be in another form of action; and, when we add to this the unqualified and uncontradicted denial of the defendant that any contract was made we must come to the conclusion that the testimony not only fails to sustain a promise, but that in fact none, either express or implied, ever existed.

But the plaintiffs rely upon an alleged custom or usage in that neighborhood by which, under like circumstances, the parties receiving this incidental benefit have recognized a liability to pay a certain specified sum (one cent) for each cask of lime burned from the rock taken out of the quarry thus drained. It is claimed that this usage of itself raises an implied promise on the part of the defendant.

It requires the citation of no authorities to show that, to give a custom the force of law, among other things, it must be universal, and its origin in point of time so far back "that the memory of man runneth not to the contrary." This custom is at best but a local one, and is confined to "a particular

business or employment," and so recent in its origin that its beginning is within the memory of some of the witnesses. But as a local and limited usage the evidence fails to show its uniformity or certainty. On the other hand it appears that the price paid was not the same in all cases, and in many instances both the price paid and the liability was the result of a contract; nor does it clearly appear that this was not true in all cases, while in the constantly varying circumstances attending each case the application must be difficult and uncertain.

But assuming the evidence to be plenary, and to establish all that is claimed for it, still, as a local and limited usage—and it can be no other—while it may be received to modify a contract, to explain the intention of the parties to it in case of an ambiguity, or the meaning of certain words used, or control to some extent the modes of dealing between parties in like business, as well as the manner of performing their contracts, many illustrations of which may be found in the usages of banks and merchants, but "it cannot be received to establish a liability, or to prove the origin of the relation by which the parties became responsible to each other." Such a usage may have an application to a contract previously existing, but cannot of itself create one. Nor can it be received to change an express contract, or in violation of an established principle of law. *Leach* v. *Perkins*, 17 Me. 462; *Kendall* v. *Smith*, 63 Me. 105; *Bodfish* v. *Fox*, 23 Me. 90; *Adams* v. *Morse*, 51 Me., 497; *Dickinson* v. *Gay*, 7 Allen, 29; *Waters* v. *Lilley*, 4 Pick. 145. If this alleged usage is allowed to prevail in this case, it imposes a contract liability upon this defendant in direct opposition to the established principle of law requiring assent to a binding contract. This action must therefore fail, whatever remedy may be open to the plaintiffs in a process of a different form. *Judgment for defendant.*

PETERS, C. J., and WALTON, VIRGIN, LIBBEY and FOSTER, JJ., concurred.

MICKLE & CO. v. DOUGLAS ET AL.

(75 Iowa 78; 39 N. W. 198. Supreme Court. September 6, 1888.)

Implied reserve of surface support. A lease granted the right to mine "all the coal" under certain described premises, over which a railroad was operated, the lease to continue 15 years, unless "all the coal is sooner mined out." Held, that the lessees could mine only so much of the coal as could be removed without injury to the surface.

[1]**Removal of fixtures allowed after forfeiture.** The lease provided that for failure to pay the stipulated royalty within 30 days after due, and to perform the conditions of the lease, the lessors might declare a forfeiture and take possession of the mine and all property connected therewith. It also provided that engines, buildings, etc., placed on the premises by the lessees, might be removed at the termination of the lease, "unless all right thereto has been forfeited by a forfeiture of this lease." *Held*, that a forfeiture declared for non-payment of the royalty did not deprive the lessee of the right to remove buildings and other personal property within a reasonable time.

Appeal from District Court, Monroe County; E. L. BURTON, Judge.

Action by the firm of J. Mickle & Co., against Archie Douglas, administrator of Aaron Hicks, deceased, William Hicks, and Martin Hicks, upon a lease granting the right to mine coal. Plaintiffs seek to recover damages for the breach of an implied covenant for quiet enjoyment, and also to recover the value of certain buildings erected on the premises, which the defendants converted to their own use. Trial to the court, and judgment for defendants. Plaintiffs appeal.

LAFFERTY & MORGAN, MCNETT & TISDALE, and ANDERSON & ANDERSON, for appellants.

HENRY L. DASHIELL and H. W. GLEASON, for appellee Martin Hicks.

[1]*Wick* v. *Bredin*, 189 Pa. 83; 42 Atl. 17.
Cassell v. *Crothers*, 193 Pa. 359; 44 Atl. 446.

T. B PERRY, for appellees Douglas and William Hicks.

SEEVERS, C. J. 1. A sufficient statement of the material facts applicable to the first point determined, we think, is the following: The defendants, or those under whom they claim, owned certain real estate, which was underlaid with coal. Works had been erected, a shaft constructed, and coal mined, when the defendants leased said works and all property on the premises used for mining coal to the plaintiffs, together with the right to mine coal, for which the latter agreed to pay royalty for all coal mined. The plaintiffs, under the lease, had no right to the surface except so far as was necessary for the due prosecution of the mining right. Over the premises so leased a railroad had been constructed, and was being operated at the time the lease was executed. The plaintiffs, upon making the attempt to mine the coal under the railway company's right of way, were enjoined from so doing at the instance of such company. For the purposes of this case it must be conceded such injunction was rightfully issued, and bound all parties to this action. But the plaintiffs claim that under the lease they had the right and were bound to mine all the coal underlying the leased premises, including that under the right of way; and as appellants have been deprived of such right, they have been greatly damaged. The lease provides and grants to the plaintiffs the right to mine "all the coal" under certain described premises. The contention of the appellees is that such right was subject to an implied covenant on the part of the "lessees that they, in mining the coal from under the right of way, shall do so with due regard to the rights of the owner of the surface, and leave all needed subjacent supports." The railway company, for all practical purposes owned the surface, and the defendants the coal thereunder. The right to mine this coal was granted to the plaintiffs, and the question is, what is the extent of such right, or what does it include? In the absence of a contract to the contrary

the right to mine coal underlying the surface of land is subject to an implied covenant that only so much of the coal can be removed as can be obtained without injury to the superincumbent soil or surface. In other words, as there are two estates, the right to mine is regarded as the servient estate, and can be enjoyed to such extent as will not cause injury to the dominant estate or surface. It is therefore incumbent on the owner of the mining right to leave coal sufficient, or otherwise support the surface. The authorities cited by counsel for appellees support this view, and none have been cited by counsel for appellants that conflict therewith. The authorities cited are Wood, Landl. & T., § 575; *Jones* v. *Wagner*, 66 Pa. St. 429; *Horner* v. *Watson*, 79 Pa. St. 242; *Coleman* v. *Chadwick*, 80 Pa. St. 81; *Marvin* v. *Mining Co.* 55 N. Y. 538. Such being the rule in the absence of a contract, a construction of the provisions of the lease is required. All the coal under the land was granted to the plaintiffs; that is, under the lease the right to mine and remove it was granted to the plaintiffs, subject, however, to an implied covenant that sufficient support must be left so as not to materially injure the surface or dominant estate. There is not, we think, any thing in the lease which will deprive the owner of the dominant estate of such covenant, nor did the lessors, in defining the right granted, use language which, expressly or by implication, shows that such covenant could not or did not exist. In addition to what has been said, the lease provides that it shall continue 15 years, unless "all the coal in said land is sooner mined out and exhausted. But it is expressly agreed that said lease shall terminate whenever all coal under said land is mined out and exhausted." The proper construction of these provisions is that the lease shall continue for the stated time, unless all the coal is mined which can be taken out without injury to the dominant estate. There is no language used which forbids this construction, and, under the authorities above cited, we think language used upon which the claim of

appellants is based should be clear, certain, and free from serious doubt. It was adjudged in the case in which the injunction was issued that the coal could not be removed without injury to the surface or dominant estate, and, for the reasons stated, the plaintiffs cannot recover on the first count in the petition.

2 It is provided in the lease that if the plaintiffs failed to pay the stipulated royalty within 30 days after the same became due, and to faithfully perform the conditions of the lease, the same, and all the rights thereunder, should be forfeited, and the defendants might so declare, and in a lawful manner take possession of the mine and all property connected therewith. In April, 1884, the defendants elected to declare the lease forfeited upon the ground that the plaintiffs had "failed to comply with the terms, conditions, and stipulations of said lease, and in particular in not paying the royalty or rent." In response to a notice of the declaration of such forfeiture, the plaintiffs, a few days thereafter, notified the defendant that, without conceding the legality of the forfeiture, "we hereby consent to a surrender, and hereby give you possession of the leased premises and property. * * * But we do not intend hereby to waive our right to remove from the premises within a reasonable time our property now situated thereon, nor any other rights growing out of said lease except as hereinbefore surrendered." Thereupon the defendants took possession of the leased property. The lease contains this provision: "But it is expressly agreed that any new engines, boilers, pumps, or other machinery, buildings, houses, and other property placed in or upon said mine and real estate, which is not in the nature of repairs thereon, may be removed by plaintiffs, at the termination of this lease, unless all right thereto has been forfeited by plaintiffs by a forfeiture of this lease." The evidence tended to show that plaintiffs erected certain houses on the leased premises, which were not in the nature of repairs. The plaintiffs surrendered possession of the

premises to the defendants on the 6th day of May, 1884, and on the 27th day of the same month demanded possession of said houses and other property on the leased premises, including mules, car-wheels, coal-props, etc., and, failing to obtain such property, this action was brought to recover the value thereof. We believe the material controversy is as to the right of the plaintiff to recover the value of the houses. We understand the law to be that when one person builds houses upon the land of another, with the latter's consent and agreement that they may be removed, such houses are and continue to be personal property, and the right to remove may be exercised within a reasonable time after the contract under which the erections were made has expired. *Dame* v. *Dame*, 38 N. H. 429; *Russell* v. *Richards*, 11 Me. 371; *Smith* v. *Benson*, 1 Hill, 176; *Vilas* v. *Mason*, 25 Wis. 310; *District Tp. of Corwin* v. *Moorehead*, 43 Iowa, 466. It follows, of course, if the right to remove is denied, an action may be maintained to recover the value of the buildings. We do not understand counsel for appellees to controvert the foregoing proposition. His contention is that when the forfeiture was exercised and declared, the right of removal ceased to exist. The language relied on is that above quoted, and it is claimed the contract of the parties was that the houses might be removed at the termination of the lease, unless all right thereto has been forfeited by the forfeiture of the lease. Now, what is the proper construction of the provisions of the lease in relation to the removal and forfeiture? When the forfeiture was declared, the lease ceased to exist, but not necessarily so as to the right of removal. The parties, at the time of the forfeiture, would be entitled to the same rights as if the lease had expired at the time fixed and limited. In such case the right of removal could certainly be exercised. The lease provides that the property may be removed "unless it has been forfeited by the forfeiture of the lease." The forfeiture of the lease does not

necessarily forfeit the property placed on the premises. The words "unless it is forfeited" clearly show and must mean that the plaintiffs must have done something, or omitted to do something, required by the lease when a forfeiture of the houses and other personal property could be claimed. There must be a valid reason for such forfeiture, independent of the forfeiture of the lease for non-payment of rent or for any other reason disclosed in the record. Forfeitures are not favored. It is true the lease provides that in a certain contingency all rights of the plaintiffs under the lease shall be forfeited, and that the defendants may take possession of "said mine and all property connected therewith." Now, it appears from the record that certain mules and other personal property were on the leased premises at the time the forfeiture was declared, and had been used thereon in connection with the mining operations. Clearly, we think, such property was not forfeited, and it is not so claimed. If not, why should the houses and other buildings? The provisions of the lease referred to must be construed as meaning the possession of the mine, and all right of the plaintiffs under the lease thereto, and not to personal property placed on the premises by the plaintiffs and used for mining purposes, for as to such property the right of removal existed, unless, as we have said, there was some reason why it should be forfeited independent of the provision in relation to the forfeiture of the mine. We think it should clearly appear that the lease provides that the property in question may be forfeited before it can be so declared. That such an inference can be drawn, based on a doubtful construction of the language used, is not sufficient. The question upon which this case turns was not involved in *Dostal* v. *McCaddon*, 35 Iowa, 318, and counsel do not so claim, as we understand. Conceding the correctness of the foregoing views, the evidence tends to show that the plaintiffs are entitled to recover on the second count in the petition, and, as the District Court held otherwise, the judgment must be *reversed.*

NATIONAL TRANSIT CO. v. W. W. WESTON ET AL.

(121 Pennsylvania 485; 15 Atl. 569. Supreme Court. October 1, 1888.)

No estoppel between buyers at different judicial sales. A defendant in ejectment, who is in possession as a purchaser at a judicial sale of the land subject to the lien of a mortgage, is not estopped from defending his title against a purchaser at a subsequent judicial sale for the mortgage debt.

[1]**Oil taken by party in possession.** The true owner of land may not sustain trover for the value of oil, or other products of realty, produced and removed from the premises in the exercise of a colorable title, without fraud or force, by one in adverse possession.

Law changed as to replevin only. The act of May 15, 1871, P. L. 268, authorizing replevin for chattels severed from realty, though the title be in dispute, is limited to that form of action, and the only other proper remedy remaining to the owner is ejectment, and proceedings for mesne profits.

Error to Court of Common Pleas, Warren County.

Trover by W. W. Weston, Orrin Weston, and A. Weston against the National Transit Company, to recover the value of 376.16 barrels of crude petroleum oil produced by J. D. Gill from a leasehold of which he was in possession under claim of title, and delivered to the defendant for transportation, and which, after being transported, was redelivered to Gill while still in the possession of the leasehold. The facts, as found on the trial below, are that on November 29, 1882, one A. R. Curtis, holding a leasehold right for the purpose of prospecting for and operating in the production

[1]Neither trover nor replevin lies where the ore, stone or other mineral was taken out by a bona fide claimant under color of title and the ownership of the ore cannot be decided without trying the title to the land out of which it was taken. *Brown* v. *Caldwell*, 12 M. R. 674. *Mather* v. *Trinity Church*, 14 M. R. 472. *Harlan* v. *Harlan*, 15 Pa. 507. *Anderson* v. *Hapler*, 34 Ill. 436. *Page* v. *Fowler*, 28 Cal. 605. *Smith* v. *Idaho Co.* (Cal.), 11 Pac. 878. *Giffin* v *South West Pa. Pipe Lines*, 172 Pa. 580; 33 Atl. 578. *Lehigh Co.* v. *New Jersey Co.* 17 M. R. 600.

of oil, gave the plaintiffs a leasehold mortgage to secure the payment of a bond of $2,000, payable in installments, the last of which became due September 1, 1883; that after the recording of this mortgage two laborer's liens were entered against the interest of Curtis under the provisions of the acts of 1868 and 1869 relating to laborers' liens on leasehold estates, under which liens the interest of Curtis was sold at sheriff's sale on November 12, 1883, to J. D. Gill, who went into possession and claimed to hold against the plaintiffs, the mortgagees, who subsequently, on December 17, 1883, purchased the leasehold under execution on a judgment recovered on their mortgage bond; that while thus in possession Gill produced the oil in question, and delivered it between April 21, 1884, and March 14, 1885, to the defendant, a common carrier engaged in the business of transporting and storing oils, and it was redelivered to Gill as follows: May 1, 1884, 82.97 barrels; November 26, 1884, 147.81 barrels; and March 19, 1885, 145.38 barrels; that after May 1, 1884, and before November 26, 1884, the plaintiffs, by writing bearing date May 15, 1884, notified the defendant of their claim, and that they would hold it responsible for all oil run into its custody thereafter; that on August 9, 1884, the plaintiffs brought ejectment against Gill, and recovered judgment, under which possession was delivered to them on December 2, 1885. See *Gill* v. *Weston*, 1 Atl. 917.

In its conclusions of law the court ruled as follows: "Trover lies by the owner of personal property against a bailee who delivers it to a wrongful bailor after notice of the rights of the true owner. The defendant was a bailee of the oil for transportation and storage. As incidental to the issue trying, the plaintiffs give evidence of their title to the leasehold from which the oil was taken. While it is true that Gill was in possession, claiming the title during the time the oil was being produced, we think his possession was not such an actual adverse possession as will defeat the

right of the plaintiffs to maintain this action, under the ruling in *Mather* v. *Trinity Church*, 3 Serg. & R. 509, and succeeding cases. Gill got the possession of the leasehold as assignee, by operation of law, of Curtis, the lessee. His rights can rise no higher than those of Curtis. His possession was after the lien of the plaintiffs' mortgage attached. He held in subservience to, or rather under, the title of Curtis; and Curtis held in subservience to the title of his mortgagees, the plaintiffs. Curtis is estopped from denying a title he created; and Gill, claiming under Curtis, is estopped." The defendant, the National Transit Company, took a writ of error.

BROWN & STONE and H. MCSWEENEY, for plaintiff in error.

CHARLES DINSMORE and JAMES CABLE, for defendant in error.

GREEN, J. We think the learned court below was in error in applying the doctrine of estoppel to the claim of the defendant. The oil in controversy had been received by the defendant as a common carrier, for purposes of transportation, from Gill, who had produced it in the regular course of his business as an oil producer. He was in possession of the land from which the oil was obtained under a sheriff's deed made in pursuance of a judicial sale upon a judgment *sur* mechanic's lien against the former owner. We discover nothing in this record to indicate any fraud or force in the possession of Gill, and he certainly had a right to defend his title by any means which tended to defeat the claim of the plaintiffs, who were also purchasers at a subsequent judicial sale. Certainly, there were no relations between Gill and these plaintiffs which made room for the doctrine of estoppel to be applied to close Gill's mouth, and tie his hands as against them. They were strangers and adverse claimants to the same property, under different and conflicting sheriff's sales.

Gill had asserted nothing and done nothing to mislead the plaintiffs in any way. If Curtis, the former owner, as whose property the land was sold, had given a mortgage which was subject to any kind of defect, and the property was exposed to sale by the sheriff under a valid judgment, certainly any stranger could buy it, and take advantage of such defect, whether Curtis could do so or not. In *Uhler* v. *Hutchinson*, 23 Pa. St. 110, we held that the holder of an unrecorded mortgage, or of a mortgage illegally recorded, by giving notice of its existence at a sheriff's sale upon a judgment, cannot bind the estate mortgaged in the hands of a purchaser at such sale, where the judgment creditor had no notice of the mortgage when his judgment was entered. While the mortgage would have been perfectly good against the mortgagor, that consideration did not impair the title of the purchaser, or clog it with any estoppel to which the mortgagor might be subject. The case of *Calder* v. *Chapman*, 52 Pa. St. 359, is another emphatic illustration of the same doctrine.

There being no estoppel in the defendant's way, the only remaining question is whether trover would lie to recover the value of the oil removed from the premises by Gill during the period of his possession. He was certainly in the actual adverse, hostile possession of the land, claiming by color of title, and removed the oil in the exercise of his colorable title. The oil was a part of the profit of the land, as much so as growing crops. It was in no sense a fixture or distinctive part of the improvements upon the land. Prior to the act of May 15, 1871, (P. L. 268), neither replevin nor trover would lie for the recovery of articles severed from the freehold by an adverse claimant in possession; the proper remedy being ejectment and for mesne profits. *Mather* v. *Trinity Church*, 3 Serg. & R. 509; *Powell* v. *Smith*, 2 Watts, 126; *Lehman* v. *Kellerman*, 65 Pa. St. 489. By the terms of that act it is provided "that in all actions of replevin, now pending or hereafter brought, to recover timber, lumber, coal, or other property

severed from realty, the plaintiff shall be entitled to recover, notwithstanding the fact that the title to the land from which said property was severed may be in dispute." As the language of the act is limited to the action of replevin, it does not embrace any other form of action, and hence is inapplicable to actions of trover. The case of *King* v. *Richards*, 6 Whart. 418, has no application to the facts of this case. There the bailee delivered the goods to the true owner, and was sued by the bailor, and it was held that the delivery to the true owner was a good defense. But the goods in question were not profits of land severed from the freehold by one in adverse possession; and no such question could or did arise as the one developed on this record.

Judgment reversed.

WILLIAM RAISBECK v. JOHN ANTHONY ET AL.

(73 Wisconsin 572; 41 N. W. 72. Supreme Court. Dec. 22, 1888.)

Prospector's rights by statute. The Wisconsin statute, where land is explored by a prospector with consent of the owner, provides that he shall not be deprived of the profits of the find by any arbitrary action of the owner.

[1]**Zinc range broken by fault, Held to be same vein beyond.** Plaintiff was the owner in fee of premises in which was a range of mineral discovered and worked by defendants. Under an agreement defendants were limited to work the range to a certain point on the land. About half the distance had been worked when a solid wall of rock was struck against, at which the crevice they were following abruptly ended and the yield of ore stopped. Another shaft was sunk about 45 feet ahead, and in the general direction of the range. From this shaft a drift was made in the same general direction, and finally a crevice was struck in which mineral was again found. This was only a few rods from the point where the crevice "pinched out." The crevice, before it reached the barrier, and after the barrier was passed, was of the same general character. There was no change in the rock, and the mineral found on both sides of the barrier was alike. *Held*, not a new discovery of ore so as to relieve defendants from the limitation prescribed in the original entry.

Insufficient evidence of unlimited license. The limitation on the right to work the range having been created by contract, the discoverers of the range and those claiming under them could be relieved therefrom only by contract; and the evidence (showing, among other things that the land-owner told one of the owners of the range to go where he pleased upon the range and work it as he pleased) is *held* insufficient to show that the limitation was ever abrogated.

Appeal from Circuit Court, La Fayette County.

This is an action in equity brought by the plaintiff, William Raisbeck, who is the owner in fee of certain lands in which

[1]*Cheesman* v. *Shreeve*, 17 M. R. 260.

The existence of a fault at the point in controversy, not proved by fact of existence of faults on the extension of the same vein. *Fitzgerald* v. *Clark*, 17 Mont. 100; 42 Pac. 273.

Proving vein through fault. *Anaconda Co.* v. *Heinze*, (Mont.) 69 Pac. 909.

is a range of mineral, against the defendants, John Anthony and Louisa C. Anthony, who claim under the discoverers of such range to be the owners thereof. A trial of the action resulted in a judgment for the defendants, dismissing the complaint. The plaintiff appeals from such judgment.

The facts in the case, and the grounds upon which the judgment rests, are fully and clearly stated in the opinion of the Circuit judge. Although somewhat lengthy the case can best be stated by inserting here such opinion in full. It is as follows:

"This action was brought to perpetually restrain the defendants from working further ahead a certain range of mineral. This range is on the W. ½ of the S. E. ¼ and the E. ½ of the S. W. ¼ of section 21, town 2, range 1 E., in said county of La Fayette. When said range was discovered said land was owned by Robert Raisbeck, father of the plaintiff, and is now owned by the plaintiff as his devisee. Robert Raisbeck died in 1886. The plaintiff claims that the limit of the defendants to work this range is a point 300 yards west of a certain stone fence that bounds the public highway which passes over said land. The range has been worked to that point. The defendants were notified to not work beyond it, and as they persisted in doing so, this action was commenced to perpetually restrain them, and for damages, and a temporary injunction was granted restraining them from working the range beyond that point, pending this action. The range bears zinc ore, and in that consists its principal value.

John Anthony, Sr., under whom the defendants claim, as heir and widow, and one Wallace Dixon, discovered this range, or the crevice that led to it, about the year 1872. Wallace Dixon died in the spring of 1887, and John Anthony, Sr., died June 19, 1886. After the range was struck it was worked for three or four years by John Anthony, Sr., and Wallace Dixon, the discoverers, alone. Afterwards the plaintiff and his father became interested in the range as part owners,

and it is undisputed that in the year 1878 the range was owned by John Anthony, Sr., one of the discoverers, Robert Raisbeck, the owner of the land, and his son, this plaintiff. About the last-mentioned date Robert Raisbeck sold his interest in the range to John Dixon. This plaintiff, John Anthony, Sr., and John Dixon, owned and worked the range until the year 1881, when the latter sold his interest therein to his partners, and until the death of John Anthony, Sr., the range was owned by him and the plaintiff. After John Anthony, Sr.'s, death, the range was, as stated above, owned by the defendant John Anthony, as the heir of his father, subject to the interest therein of his mother, the defendant Louisa Anthony, as widow, and this plaintiff, and up to the time the injunction in this action was served it was worked by them and their servants. Since the range was discovered the rent upon all ores taken therefrom has been regularly paid to the owner of the fee.

"There is, as above stated, no question under the testimony that the plaintiff owned one-half of the range as far as it had been worked, and the defendants the other half. The matter in dispute is whether the defendants have any right to work the range beyond the point to which the work upon it had been prosecuted when the injunction was served. The contention of the plaintiff is that his father, the land-owner, when he gave John Anthony, Sr., and Wallace Dixon the right to search for ores in his land, originally confined their right to follow westward any range or valuable discovery they might make to a certain stone fence that bounded a field to the west of the place where they began to mine, and that when, in following the range they discovered westerly, they reached this fence, they were only permitted to follow this range into said field under an agreement that their right to work it should be limited in that direction by a point 300 yards west of said fence. As the range has been worked to that point, there is no doubt that, if the discoverers were

originally limited by Raisbeck, deceased, in their right to follow the range on his land, by said fence, and by subsequent agreement they were permitted to follow it 300 yards only beyond the fence, the defendants have no further right in it, and that the part of the range beyond that limit belongs solely to the plaintiff, the owner of the fee, unless since such agreement new rights have arisen. The range, at the time the injunction was served, was yielding valuable zinc ore, and seemed likely to continue to do so.

"The testimony is very meager upon the question of whether at the time John Anthony, Sr., and Wallace Dixon began to mine, about the year 1872, they were limited by Robert Raisbeck to follow any range they might discover. The license or lease under which they began to mine was verbal, as in those days was usually the case. All of the parties to it are dead, and all of the testimony bearing upon the rights the two miners originally possessed is circumstantial, hearsay, or the recollection of witnesses of statements of the parties in interest in casual conversations had years ago. There is testimony tending to show that when, in their progress in working the range, the discoverers reached the fence, they, for a short time, did not prosecute the work onward. Whether because they were originally limited, or because, as one witness who worked the mine says, the range 'pitched down' at that point into the water, and it became necessary to stop work upon it and bring up a drain to unwater it, it would be difficult for me, from the testimony, to say positively; but my impression is that it was not expected at the time of the license to mine, that a range would be discovered that would run westerly beyond said fence, and that none of the parties had in contemplation such a discovery when the mining began. I am confirmed in this impression by the facts shown by the testimony that, although at that time considerable mining had been done on the land of the licensor east of the fence, some of it within the yard surrounding his house, no range, so far as the

testimony shows, had been discovered that ran into said field on the west. It seems to me probable that when the boundary of the field was reached then arose a question of right of the discoverers to proceed, and that they did not prosecute the work until an understanding was arrived at. What that understanding or agreement was it is impossible, from the testimony, to definitely state. It was oral. It seems to have been the intention to place it in writing. A writing was drawn up, but it was never executed. What the contents of it was no one can state. I think, however, from all the testimony it is a fair conclusion that the discoverers proceeded with their work in the field upon the understanding that they were limited, in the distance they might follow the range into the field, to a point 300 yards west of the fence. As to whether that limit was absolute or contingent, I cannot, with satisfaction to myself, certainly determine. I base the conclusion that that was understood to be a limit, upon the testimony of various witnesses as to what they had heard the parties in interest say. I must say, however, that I was never more impressed with the principle that testimony of this kind is inherently weak than I was upon this trial; for, although I deduced from it that it was agreed that there should be a limit, I could not but feel that the recollection of some of the witnesses could not be much relied upon. Take the witness Davidson, for instance, the most positive witness upon this question that the plaintiff produced. No one who heard him could believe that much of what he testified regarding conversations took place as he detailed it, and I say this without any purpose to charge any willful misrepresentation to him, but only to show the weakness, as testimony, of the statements of a witness of what he recollects of conversations had years before, in a casual manner, upon a subject in which he had no interest.

The reason why a limit was named by the land-owner Raisbeck, as a condition of permitting the discoverers to follow

the range, is not to be determined from the testimony There was nothing artificial or natural in the field which would indicate a reason why work should stop at the end of 300 yards. For aught there was in the field itself, the limit might as well have been 200 yards, or 400 yards, or its western boundary. It was claimed upon the argument that the limit, if there was one, was contingent upon whether the mine proved productive enough to yield a rent to the land-owner that would make it desirable to him to have mining continued, rather than to have it stopped, and the surface of the ground upon the line of the range remain undisturbed. There is some testimony to support this claim, and in itself it does not seem to one raised in the mining region unreasonable, for it is a matter of common knowledge among those acquainted with the lead-mine region that farmers, who are willing to have an arable field or pasture dug up, if ore is raised in quantities that will yield them a fair rent, will not permit their land to be dug over by miners who are endeavoring, by prospecting, to discover ores in paying quantity, upon the line even of a known crevice or range. If the limit was not thus contingent, the only plausible reason why a limit was stated is that Raisbeck, the land-owner, was willing, as a matter of favor, to give the discoverers the right to work the range that far because they had discovered it, and that when that limit was reached, no matter how valuable the ore might be, or appear to be, beyond it, he would then, as owner of the fee, exclude them from the range.

Whatever might have been the exact agreement, the work was continued westwardly in the field. In the year 1878, the range, to use the miner's phrase, began to 'pinch out'; that is, the walls of the crevice came nearer together, and the ore sheet became thinner, and ceased to produce ore enough to pay for the cost and labor of taking it out. The owners of the range, as partners, at that time, were, as I have stated, John Anthony, Sr., one of the discoverers, Robert Raisbeck,

the landowner, and this plaintiff. Robert Raisbeck at that time desired John Dixon, an old and experienced miner, to come and work his interest in the mine, and told him that his son, this plaintiff, had not much experience as a miner, and that if he (Dixon) would work for him (Robert Raisbeck), on the range, at $1.25 per day, which was less than regular miner's wages, he would likely, after a time, give him his interest in the range. Dixon accepted the offer, and went to work. After working for a time, and the mine appearing no better, Robert Raisbeck told him that he might have his interest, if he would pay him the expense he had been to for powder, etc. To this Dixon agreed, and he became the owner of Robert Raisbeck's interest. At that time the range had almost ceased to yield ore. Dixon went into the mine to work in the hope that by working ahead paying ore would be discovered. He testifies that Robert Raisbeck gave him his interest in the range, naming no limit, and that he knew of no limit, and that it was his understanding that if he and his partners could strike paying ore that they might follow it indefinitely in Raisbeck's field. It is certain, from the testimony, that Robert Raisbeck did not want work upon the range to stop, but, on the contrary, that he was anxious in the interests of his son William, as well as himself as land-owner, that efforts should be made to find upon it valuable ores. After Dixon became the owner, the range was followed about one hundred feet, some zinc ore being taken out, when it became barred up; that is, a solid wall of rock was struck against at which the crevice they were following abruptly ended, and the yield of ore stopped. I have no question that Robert Raisbeck knew this, and there is no proof that he desired, much less expressed a desire, that the work within the field should stop. A surveyor was then employed to determine, as near as possible, a point where a shaft should be sunk to strike the lost crevice, if it extended beyond the bar. A point was designated 45 feet ahead of the place where the

work had stopped. A shaft was sunk there. It did not strike the crevice, but from it a crevice was found by drifting, but it contained no ore at the place the drift struck it. They drifted ahead, and at length, after having worked for several months without obtaining paying ore, and after John Anthony, Sr., and this plaintiff had become so disheartened that they proposed to abandon the range, and would have done so but for Dixon's persistence, ore was again found in paying quantities, and that ore was followed until work was stopped by the preliminary injunction. John Dixon sold his one-third interest in the mine, as stated heretofore, about 1881, and received for it $600. The testimony of John Dixon, as above substantially given, was not contradicted.

"I find the facts above stated to be true. From them I can but conclude that, whatever talk there was of a limit when the work in the field began, there was no purpose upon the part of Robert Raisbeck to limit the work upon the range when he requested John Dixon to come and work upon it, and that Dixon and John Anthony, Sr., and this plaintiff, who together worked the range as owners of it, did not understand from the time Dixon became an owner that their rights were limited by a point 300 yards from the fence. Nearly half of this distance had been worked when they struck the bar, and it seems to me improbable that they would after that, work hard for months, without remuneration, to develop a range that had ceased to yield ore, if they believed that they could not follow beyond a point not far in advance of the ore their persistence might discover. The landowner must have understood that they were not then working under a belief that they were limited, and I think it a fair conclusion that he had abandoned the intention of insisting upon a limit. It would be altogether unlikely, in view of the hard and unpaid work that was being done, and that he must have known of, that he could have had the purpose of insisting upon a limit as to his son, and, under the circumstances, it would have been

manifestly unfair to have applied a harsher restriction upon the partners of the son than to him.

I find that the crevice they struck beyond the bar was practically a new crevice, and that the ore they finally found in it was in fact a new and valuable discovery; that the land-owner, Robert Raisbeck, knew that after they struck the bar they were working to find a new crevice; that he did not object; that it was with his sanction and license that they prosecuted the work; and that no limit was imposed upon them beyond which, in said field, they should not work any crevice or valuable discovery of ore they might strike.

"As final conclusions of fact I find that the plaintiff and the defendants are the owners of the range which was being worked by them upon the lands of the plaintiff at the time this action was commenced; that the plaintiff owns the one-half of said range and the defendant John Anthony owns the other half thereof, as the heir of his father, John Anthony, Sr, subject to the rights in said half of his co-defendant, Louisa Anthony, as the widow of John Anthony, Sr.; that the defendants, as the owners of one-half of said range, and as tenants in common thereof, with the plaintiff, were in the lawful possession of said range at the same time this action was commenced, and that they had the right, as such tenants, to work thereon subject to the payment of a ground rent to the plaintiff as landlord; that the right of defendants to work said range is not limited by a point 300 yards west of said fence.

"And as conclusions of law that judgment be entered, dismissing the plaintiff's complaint upon the merits, with costs, and dissolving the preliminary injunction that has been granted in this action."

ORTON & OSBORN, for appellant.

BUSHNELL & WATKINS, for appellees.

LYON, J., (*after stating the facts as above.*) We think the testimony is sufficient to sustain the finding of fact that John

Anthony, Sr., and Wallace Dixon discovered the range of mineral in controversy, on the land of Robert Raisbeck, about the year 1872. We are also of the opinion that it is sufficiently alleged in the answer, by necessary implication at least, and proved, that Anthony and Dixon entered upon, and prospected the lands in which the range of mineral was found, by the consent and license of Robert Raisbeck, the owner thereof. This appears from the allegations that they made such discovery of the range, and paid the rent for the mineral obtained therefrom to such owner, who accepted the same, and from the proofs of those facts, and the presumptions fairly deducible from the evidence that they so entered peaceably and with the knowledge of the owner, who made no objection thereto.

This brings the case within the provisions of chapter 260, Laws 1860, as amended by chapter 117 of 1872, being section 1647, Rev. St., except in so far as the statutory rights of the discoverers may have been restricted by special contract between Anthony and Dixon and the owner of the land. If there was no such restriction, the discovery of the range or the crevice which contained the mineral rendered the license irrevocable by the land-owner, and vested in the discoverers the title to the ores in the range or crevice on the lands of the licensor, subject only to the rent due him. If such title so vested in the discoverers, it necessarily results that neither a sale of the land by the licensor, nor of the range by the licensees, nor the death of either or all parties, would operate to revoke such license. If the licensor limited the right of the discoverers to work the range or crevice only to a certain point, such limitation is binding, and the statute gives the discoverers no right therein beyond the point of limitation.

The statute above mentioned is as follows: "Sec. 1647. Where there is no contract between the parties, or terms established by the landlord to the contrary, the following rules and regulations shall be applied to mining contracts and

leases for the digging of ores or minerals, namely: (1) No license or lease, verbal or written, made to a miner, shall be revocable by the maker thereof after a valuable discovery or prospect has been struck, unless the miner shall forfeit his right by negligence such as establishes a forfeiture according to mining usages. (2) The discovery of a crevice or range containing ores or minerals shall entitle the discoverer to the ores or minerals pertaining thereto, subject to the rent due his landlord, before as well as after the ores or minerals are separated from the freehold; but such miner shall not be entitled to recover any ores or minerals, or the value thereof, from the person digging on his range in good faith, and known to be mining thereon, until he shall have given notice of his claim; and he shall be entitled to the ores or minerals dug after such notice. (3) Usages and customs among miners may be proved in explanation of mining contracts to the same extent as usage may be proved in other branches of business."

The contention of the plaintiff is that Anthony and Dixon were limited by their agreement with Robert Raisbeck to a point 300 yards west of the stone fence, beyond which point their license gave them no authority to mine, while that of the defendants is that there was no limitation upon their right to work the range or crevice entirely across Raisbeck's land, if the same extended across it.

The circuit judge found that when the license was given it was not in the contemplation of the parties that the range extended west beyond the stone fence; that when the fence was reached there probably arose a question between them as to the right of the licensees to proceed further; and that the work was suspended, and negotiations were had which resulted in an agreement limiting the right of the latter to mine the range to a point 300 yards west of the stone fence, and no further. A careful perusal of the testimony satisfies us that these facts were correctly found. The judge

commented somewhat upon the intrinsic weakness of the testimony upon which the above findings rest, and doubtless there is some force in his observations. But it must be remembered that the transactions rested in parol, and the original parties thereto had all deceased before the cause of action arose; hence the testimony was the best that could be obtained. In our view it quite satisfactorily establishes the facts thus found. The judge also expresses some doubt as to whether the limitation was not contingent upon the failure to find mineral in paying quantities beyond the 300-yards point to the westward. Without stating the testimony bearing upon the doubt thus suggested, or going into any discussion of it, it must suffice to say we think the evidence is that the limitation was absolute. There having been an uncertainty as to the extent of the original license, and probably a controversy between the parties in respect thereto, the 300-yards limit settled upon by them when the stone fence was reached, removed such uncertainty, and terminated the controversy, and the limitation thus agreed upon became, by relation, a part of the original contract or license, and settled conclusively what were the terms thereof.

Were the foregoing facts all there is of the case, there can be no doubt the plaintiff would be entitled to the relief he demands; for, standing alone, they demonstrate that the defendants have no rights in the range west of the 300-yards point, and inasmuch as they persist in working the range beyond that point, the plaintiff would be entitled to a perpetual injunction restraining them from so doing. But the circuit judge made two deductions from the testimony upon which he based the judgment for the defendants. These are (1) that after the crevice had been worked to the point where it pinched out, and Robert Raisbeck had employed John Dixon to prospect ahead for the purpose of again finding it, and after Dixon had become a part owner of the range,

it was the understanding of all the parties interested that the limitation to the point 300 yards west of the stone fence was no longer binding upon the owners of the range, but that they were at liberty to work the crevice across the lands of Robert Raisbeck west of that point; and (2) that the crevice discovered by John Dixon beyond the point where the original crevice pinched out was a new one, and the ore which Dixon and his associates found therein was a new and valuable discovery, made under a license from the land-owner, which contained no limitation of their right to mine the crevice entirely across his land, should it extend so far. Whether the above deductions were correctly made, and if so, their effect, will now be considered.

1. The limitation in question was created by contract, and the discoverers of the range, and those claiming under them, could be relieved therefrom only by contract. The learned circuit judge scarcely finds that any contract removing the limitation was ever made. He speaks of the purpose of Robert Raisbeck and the understanding of the owners of the range; also of the improbability that such owners would search for the crevice after the bar had been struck, and perform the labor they did in finding the mineral west of the bar, had they supposed they were restricted by the limitation. But he does not say that the parties agreed that the limitation should be removed. We fail to find any sufficient evidence in the record to prove that any such contract was made. The owners of the range at the time were John Anthony, Sr., John Dixon, and the plaintiff John Anthony, Sr., was a party to the contract of limitation, and must have known that it was made. John Dixon knew, also, that there was a limitation. He purchased his interest of Robert Raisbeck, and testified on the trial that before he so purchased Raisbeck told him there was a limit, but not where it was. Knowing the existence of a limitation, they could only avoid it by a contract with Robert Raisbeck rescinding it. They obtained no such contract

from him. True, John Dixon testified that Robert Raisbeck told him to go where he pleased on the range, and work it as he pleased; but this was not sufficient to relieve the parties from the limitation which they knew they were subject to. It must be held that the evidence fails to show that the limitation in question was ever abrogated.

2. It only remains to consider the question, was the crevice which John Dixon found west of the point where the original crevice pinched out, a distinct crevice, and a discovery of the ore therein a new discovery; or was it a continuation of the original crevice and vein of mineral therein? It was not a new crevice, and a new discovery, merely because the original crevice ceased to yield ore, and pinched out. This may have occurred, and still the crevice or vein be the same throughout. In *Mining Co.* v. *Cheesman*, 116 U. S. 529, 6 Sup. Ct. 481, this subject was considered, and the following definition of a lode or vein (which we understand to be the equivalent of a range or crevice, as those terms are employed in this case) is given; "In general it may be said that a lode or vein is a body of mineral or body of rock, with defined boundaries, in the general mass of the mountain." This is the definition given by Judge HALLETT, in *Stevens* v. *Williams*, 1 McCrary, 480–488. Speaking of obstructions to a vein or lode, Mr. Justice MILLER, who delivered the opinion of the court in the case first above cited, said: "Now, a vein containing the precious metals is by no means always a straight line of uniform dip, or thickness, or richness, of mineral matter throughout its course. Generally the veins are found in what, when the mineral is taken out of them, constitute clefts or fissures in the surrounding rock, with a well-defined wall above and below of different kinds of rock, as porphyry, on one side, above or below, and limestone on the other. So long as these inclosing walls can be distinctly and continuously traced, and the mineral matter of the same character found between them, there can be no

doubt that it is the same vein. But sometimes the cleft between the inclosing rocks, called, in mining parlance, the 'country rock,' diminishes so as to be scarcely perceptible. Sometimes, for a short distance, the fissure disappears entirely, and again is found distinctly to exist a little further on. Again it is seen that, though the underlying and superposing country rock is there, the mineral deposit ceases to be found, but, following the fissure, it reappears again very soon. It also happens that both fissure and mineral come to an end, and are found no more in that direction, or, if found, so far off, or so deflected from the original line, as to constitute no part of that vein. Of course, it is sometimes easy to see that it is the same vein all through. It is also easy to see, in some instances, that the vein is run out,—is ended." The court there sustains the following instruction given to the jury by the trial judge: "With well-defined boundaries very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and if in such fissure ore is found, although at considerable intervals, and in small quantities, it is called a 'lode.' "

In the present case it appears, by the testimony of John Dixon and the defendant John Anthony, that at a point about 100 feet west of the second shaft, beyond the stone fence, the crevice pinched out; that is, the walls thereof came nearly together. As the latter witness expressed it, "they barred up very narrow to a seam." The owners of the range thereupon sunk another shaft to the westward, in the general direction of the range, hoping to strike the lost crevice. The circuit judge found that this shaft was 45 feet ahead of the place where the work had stopped. The evidence does not clearly show the location of such shaft, but it was probably not many yards west or southwest of the point where the crevice had pinched out. From this shaft a drift was made in the same general direction, and finally a crevice was struck in which mineral was again found. It does not

satisfactorily appear how far this drift was run before the crevice was struck, nor how far the latter point is from the point where the crevice pinched out. The fair inference from all the testimony, however, is that it could not have been more than a few rods. The parties working the range, especially John Dixon, who had the principal direction of the work, supposed that they had found the original crevice, and none of them seem to have thought they had found a new vein of mineral. Dixon uniformally speaks of the last-alleged discovery as "striking up the diggings again," and says that he expressed the opinion, when they came to the obstruction, that the vein was "split up," and he was determined to explore further for it. The idea of the new discovery seems first to have taken shape on the trial in the circuit court. So far as the testimony shows, the crevice, before it reached the barrier, and after the barrier was passed, was of the same general character. No change in the rock, or in general direction of the crevice, is indicated. Besides, the mineral found on both sides of the barrier was alike.

The above considerations have impelled our minds to the conclusion that, within the definition of a lode or vein above given, the crevice east of the barrier, which cut the same off, and that discovered west of the barrier, which extends to the 300-yards limit, is one and the same crevice or range, and that the findings of the mineral therein, west of the barrier, is not in any correct sense a new discovery.

It follows from the foregoing views that the plaintiff is entitled to judgment.

By the Court:—The judgment of the circuit court is reversed, and the cause will be remanded with directions to that court to give judgment for the plaintiff granting the perpetual injunction as prayed, and awarding him compensation for the mineral taken by the defendants from the crevice west of the 300-yards point, and appropriated to their own use.

GALEY BROTHERS v. FRED KELLERMAN.

(123 Pennsylvania 491; 16 Atl. 474. Supreme Court. January 7, 1889.)

[1]**A clause in a lease that failure to do a certain thing shall "render this lease null and void" does not make the lease void ab initio upon failure to perform, but void only from and after the default.**

Agreed damages for delay based on a "per annum." Construction of the period of delay. Lessees agreed to commence operations within sixty days and to complete one oil well within three months thereafter, in default of which they were to pay, within three months after the lapse of such period, at the rate of $1,000 per annum as damages for the delay: *Held*, that the lessees were liable for a delay of 60 days plus the first period of three months, making five months in all, or five-twelfths of $1,000.

On September 9, 1886, a summons in covenant was issued in an action by Frederick Kellerman against John, Samuel, Robert and William Galey, doing business as Galey Brothers.

The paper books filed contained neither the declaration, the plea, the affidavits of claim and defence, nor the testimony; but a lease was printed in the appendix, dated December 28, 1885, between Frederick Kellerman of Allegheny County, of the first part, and Galey Brothers, Rochester, Pa., of the second part whereby "in consideration of the stipulations, rents and covenants hereinafter contained, on the part of the said parties of the second part, their," etc., the party of the first part demised to the parties of the second part, for the sole and only purpose of drilling and operating wells, and storing, transporting and conveying petroleum oil or gas through, over and from it, a certain tract of land in Bridgewater borough, Beaver County, containing three acres, more or less. The lease contained the following paragraphs:

[1]*Leatherman* v. *Oliver*, 17 M. R. 526. *Bartley* v. *Phillips*, 18 M. R. —. *Henne* v. *South Penn Co.* (W. V.) 43 S. E. 147.

"To have and to hold the said premises, for the said purpose only, unto the parties of the second part, their executors, administrators and assigns, for, during and until the full term of ten years next ensuing the day and year above written, on express condition that one well be completed each year during said term, at lessor's option. * * *

"Operations on the above described premises shall be commenced in 60 days and one well completed within three months therefrom, and in case of a failure to complete one well within such time, the said parties of the second part hereby agree to pay to party of the first part, for such delay, the sum of ten hundred dollars per annum, within three months after the time for completing such well, as above specified, payable at T. Mellon & Son's Bank; and the party of the first part hereby agrees to accept such sum as full consideration in payment for such yearly delay until one well shall be completed, and a failure to complete one well or to make any of such payments within such time and at such place as above mentioned, renders this lease null and void, and to remain without effect between the parties hereto." * * * * *

It appears on the argument in this court, that the times provided in the lease for the completing of the well, or for making the payment provided for, to wit: May 28, 1886, and August 28, 1886, having fully expired without anything done by the lessees, the plaintiff made demand from the defendants and at T. Mellon & Sons' Bank for the stipulated payment, which was refused, whereupon he brought this suit "for the recovery of the penalty for delay mentioned in the lease, or the proportionate amount thereof, for such length of time as he had been deprived of the exclusive right to his property thereby, viz: 8 months."

The court, STOWE, P. J., charged the jury as follows:

Counsel for defendants asks the court to charge the jury:

1. There can be no recovery in this case, because at the time of bringing this suit the contract or lease sued on was null and void, and not in existence; that the non-payment of the rent claimed in this case, instantly upon its non-payment and *ipso facto*, render the lease null and void.

Answer: Refused.

2. The $1,000 payable under the lease in lieu of the completion of the first well, not being agreed upon as liquidated damages by the parties to the lease, there can be a recovery for only a proportion of it, to wit: That proportion of one year during which the part they had possession bears to the whole year, or, in other words, one-fourth of $1,000.

Answer: Refused.

We instruct you as matter of law that the plaintiff is entitled to recover in this case five-twelfths of one thousand dollars.

The jury returned a verdict in favor of the plaintiff for $458.32. A rule for a new trial having been discharged, the defendants took this writ and assigned as error the instruction to the jury that the plaintiff was entitled to recover, as above given.

W. F. McCOOK, for plaintiffs in error.

WINFIELD S. WILSON and JAMES H. PORTE, for defendants in error.

WILLIAMS, J. This action is brought upon a contract known as an "oil lease." By its terms the lessees acquired the right to enter upon the tract of land therein described, and drill and operate wells for the production of oil or gas on said tract for a period of 10 years, rendering to the lessor as rent or royalty one-sixth of all oil produced, if oil was found; and if gas was produced in sufficient quantities to be utilized, one-sixth of the value of the gas so produced and $1,000 per well in addition. The lessees further convenanted to commence operations upon the land within 60 days from the date of the lease; to complete one well within three months thereafter, and one additional well each year during the continuance of the lease. The following stipulation raises the only question which the case presents: "In case of a failure to complete one

well within such time, the said parties of the second part agree to pay the party of the first part for such delay the sum of ten hundred dollars per annum, within three months after the time for completing such well; * * * and the party of the first part hereby agrees to accept such sum as full consideration and payment for such yearly delay until one well shall be completed; and a failure to complete one well, or to make any such payments within such time and at such place as above mentioned, renders this lease null and void, and to remain without effect between the parties hereto." The lessees wholly disregarded their agreement. They neither drilled the first well, nor paid the money fixed upon as the price of delay by the terms of the contract; and now they allege that their failure to perform their covenants operates to absolve them from all legal liability upon their contract, and from any claim for damages for past non-performance.

The argument is that, inasmuch as the contract provides that a failure to complete one well, or to pay the $1,000 per annum agreed upon as the price of delay, shall "render this lease null and void," it must be treated as void, not from and after the default which renders it void, but *ab initio*, so that a cause of action accrued before the default or by reason of it, is extinguished. This construction overlooks the character of the agreement and the relation of its covenants. The lessees secured by it the exclusive right to operate for oil and gas on the land described. On their part, and as a consideration for the grant to them, they agreed to begin operations on the land within sixty days, and within three months were to complete the first well. If they failed to do as they agreed as to the beginning and completion of the first well, they promised to pay for their delay at the rate of $1,000 per annum. If they neither developed the land nor paid for their delay, they were by such disregard of their contract to forfeit all their rights under it, and the lease was to be rendered thereby null and void. But the forfeiture did not happen

until default made, both in completing a well and in paying for the delay or failure to complete it. This required a period of eight months, during which the lessor and his land were tied up by the contract. The lessees had the right to enter at any time during the eight months, and either drill a well or make the stipulated payment. If they did neither within the time limited, their right of entry was extinguished, and the contract itself was at an end. But the acts that forfeited their rights did not also forfeit those of the lessor. Their liabilities growing out of their non-performance are to be distinguished from their rights under the contract. The latter they could forfeit, but the former belonged to the lessor, and could not be lost only by his act. The lessees promised to complete one well within a given time. This was for the benefit of the lessor. If this was not done he was to be compensated in money. If the money was not paid he was at liberty to rid himself of his tenants and resume the possession of his land.

But the construction contended for by the plaintiffs in error transfers the punishment for the breach of the contract from him on whose default it arises to the innocent injured party. Because the lessees have secured the control of the land of the lessor by covenants which they have broken, the lessor shall be deprived of all redress at law by the very acts of his lessees which give him a cause of action. Their default takes away his remedy. The acts or omissions of which he complains are an answer to his complaint. We should need the constraint of insurmountable necessity to induce us to adopt the construction contended for.

The judgment is affirmed.

STERRETT, J., absent.

W. J. LAWRENCE v. JAMES M. GAYETTY, ET AL.

(78 California 126; 20 Pac. 382; 12 Am. St. Rep. 29. Supreme Court. January 15, 1889.)

[1]**A promise made without intention to perform is a fraud on which a contract may be rescinded.**

Mere failure to perform does not relate back so as to render the promise fraudulent.

Sufficient complaint avering fraudulent promise non-performed. In an action to set aside a deed, on the ground of fraud, allegations that defendants, the grantees, made certain promises, fully set out; that plaintiff relied upon, and had a right to rely upon, such promises and was induced thereby to and did make the conveyance; and that defendants have not performed the acts promised, and had no intention of doing so at the time they made the promises,—sufficiently set forth the material facts constituting such a fraud as under Civil Code Cal. § 1572, subd. 4, is ground for the rescission of a contract.

Failure to place improvements, not made condition subsequent. Where a deed conveying an undivided interest in land is executed in consideration of the grantees' oral promises to make certain improvements on the land, and do certain other acts in the future, and their performance is not made a condition subsequent, a mere failure to perform on the part of the grantees does not constitute a failure of consideration so as to entitle the grantor to rescind under Civil Code Cal. § 1689.

In bank. Appeal from Superior Court, Placer County; B. F. MEYERS, Judge.

Action to set aside deeds, brought by W. J. Lawrence against James M. and Peter C. Gayetty and others. Judgment for plaintiff, and defendants appeal.

VAN NESS & ROCHE, for appellants.

J. M. FULWEILER and Jo HAMILTON, for respondent.

[1]*Rorer Co.* v. *Trout*, 83 Va. 397; 5 Am. St. R. 285.

Promise to assist in future sale, no ground to set aside mining purchase contract. *Farris* v. *Strong*, 24 Colo. 107; 48 Pac. 963.

WORKS, J. Action to set aside two deeds by the plaintiff to the defendants, of a mining claim owned by him, on the ground of fraud and failure of consideration. The complaint avers, in substance, that the plaintiff was the owner of the mine, and was poor, and unable to furnish the necessary machinery and mills to develop the same; that the property was, at the time of the conveyance, of the value of $10,000, and has since increased to the value of $40,000; that the defendant Peter C. Gayetty falsely represented to the plaintiff that he had great influence with men of capital, and was able to interest them in the development, improvement, and working of the mine, and proposed and agreed that he would build, or cause to be built, on said property, certain quartz mills and hoisting machinery, and run cuts and tunnels, and make other improvements thereon within about one month, either by himself or by said men of capital, of the value of $10,000; said work to be prosecuted diligently, and plaintiff to have possession of the property and superintend the work, provided plaintiff would convey to said Gayetty, or some one to be named by him, the one-half of said land and mining claim, plaintiff to retain the ownership of the other one-half thereof, with a like interest in said improvements; that plaintiff was induced by said false and fraudulent representations to, and did, convey to the defendant James M. Gayetty, in trust for said Peter C. Gayetty, the one-half of said property; that the consideration of $150, named in said deed, was not the true consideration, and no part thereof was ever paid, and all cost of executing the deed was paid by plaintiff; that James M. Gayetty was the son of Peter C. Gayetty, and took said conveyance with a full knowledge of all the facts; that thereafter plaintiff was induced by the urgent solicitations of said Peter C. Gayetty, and to enable him to carry out his said promises, to join with the said James M. Gayetty in executing to the defendants and the plaintiff a deed for certain portions of said mining claim, describing it; that the consideration

of said last-named deed was said promises and agreements, and the further consideration, as expressed in said deed, of one-half of 100,000 shares of the capital stock of a corporation thereafter to be formed; that the same was executed on the promises of said Gayetty that said persons would go on and form a corporation for mining purposes, and issue such stock, and work and develop said mine, and erect said mill and hoisting works, and make said improvements thereon as agreed; and plaintiff, believing said representations and promises, made said conveyance, thereby vesting the legal title to said property in the defendants; that the plaintiff from his ignorance and the entire faith, confidence, and trust he had in said Peter C. Gayetty, and believing said representations and promises made by him, executed said deed first named, and without any consideration other than the false and fraudulent promises and representations aforesaid, and, also, having like faith and confidence in his and the other defendants' representations, he joined in the execution of the last-named deed; and for the whole of said property he has not received one cent of money, nor one share of stock, nor any other consideration whatever.

The complaint avers that none of said representations, promises, or agreements have been complied with; that they were falsely and fraudulently made to secure the execution of said deeds, and to deceive and defraud the plaintiff, and were known to be so made by all of the defendants; that said Peter C. Gayetty neither had nor exercised any influence with any man of capital, and never intended to pay one cent, or perform any of his said promises or agreements, or either of them; that said corporation was never formed, nor any stock issued, nor money expended on any of said proposed improvements; that plaintiff, after waiting six months, and, nothing being done or attempted to be done by the defendants, or either of them, enlisted other means, and has greatly improved said property, working and developing the same by

opening shafts, running tunnels, building mills and hoisting works, and making other improvements, thereby enhancing the value of the property to more than $20,000.

It is also alleged that "by reason of said falsehoods and deceits of the defendants aforesaid the consideration of said deeds has wholly failed."

The prayer of the complainant is that the court "order, adjudge, and decree that the defendants, and each of them, reconvey to this plaintiff whatever of the estate in said property is in him vested, and that the legal title of all of the said defendants be restored and reinvested in the plaintiff," and for general relief.

There was a demurrer to the complaint by the defendant James M. Gayetty, on the ground of ambiguity, in that it did not show the number of shares of stock of the corporation mentioned therein, or the number of shares the plaintiff was to have as part consideration for said deed, and on the further ground that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled.

The defendants answered, denying the material allegations of the complaint. There was a trial by the court, and findings in substance:

(1) That plaintiff was the owner of the property.

(2) That on the 7th day of October, 1884, the same was of the value of $10,000, and at the time of filing the complaint of the value of $20,000.

(3) That the plaintiff was poor, and unable to develop the mine; and the making of the representations and promises by Peter C. Gayetty, for himself and as agent for the other defendants, was substantially as alleged in the complaint, including the promise to form said corporation and issue to plaintiff 50,000 shares of the stock thereof.

(4) "That thereafter, on said 7th day of October, 1884, the plaintiff, in consideration of the full performance of the promises and agreements of the defendants, and relying upon

their said representation, as set out in findings four and five, and for no other consideration, executed and delivered the deeds mentioned in the complaint, and also signed the said articles of incorporation, to assist the defendants in carrying out their said promises and agreements."

(5) The recording of the deed, and the filing of the articles of incorporation of the proposed corporation in the office of the county clerk and of the secretary of state, and the issuance of the necessary certificate of incorporation.

(6) That the defendants have not performed any of the promises found to have been made, and have failed, neglected, and refused to keep or perform the same.

(7) That plaintiff kept and performed all of the covenants on his part.

(8) That there has been no false representations nor fraud in fact, but there has been a complete failure of consideration for the said deeds or conveyances, and for said contract with the defendants, and without the fault of the plaintiff."

The conclusion of law was that "plaintiff is entitled to a decree extinguishing his contract with the defendants, and nullifying and setting aside and cancelling the said deeds to the defendants, and all of them," and judgment was entered in favor of plaintiff, accordingly, from which judgment the defendants appeal.

1. The appellants contend that the complaint was insufficient, and that the court erred in overruling the demurrer thereto. It will be seen that there are two causes of action, or, rather, two grounds alleged in the complaint for setting aside the deeds, viz., fraudulent representations and failure of consideration; but these causes grow out of precisely the same state of facts. The representations alleged to have been made are not as to existing facts, but consist in mere promises to perform certain acts in the future. Independent of code provisions, the rule is that representations, to constitute sufficient ground for the relief sought in this action, must

be as to an existing and material fact, or the affirmation of a matter in the future as a fact, and not a mere opinion, statement of intention, or promise to do some act in the future. 2 Pom. Eq. Jur. §§ 877, 888; *Neidefer* v. *Chastain*, 71 Ind. 363; 36 Am. R. 198; *Welshbillig* v. *Dienhart*, 65 Ind., 94, 98.

Strictly speaking, a mere promise is not a representation, and the failure to make it good is a breach of contract, which gives a cause of action, but not the one pursued here. But the making of a promise, with no intention at the time of performing it, constitutes a fraud, for which a contract may be rescinded. Civil Code, § 1572; see, also, Bigelow, Frauds, 483 *et seq.*

The mere failure to perform the covenant does not relate back to and render the same fraudulent. It is the present intent not to perform it that renders it wrongful. The complaint alleges facts sufficient to bring it within the statutory provision as to what shall constitute actual fraud. It sets out fully the promises made, and that, at the time they were made, the defendants had no intention of performing them.

It is true, as counsel for appellants contend, that it is not sufficient to characterize a transaction as fraudulent, and that the facts constituting the fraud must be stated. *Kinder* v. *Macy*, 7 Cal. 206; *Meeker* v. *Harris*, 19 Cal. 278; *Capuro* v. *Insurance Co.* 39 Cal., 123. But the facts are pleaded here. The material facts necessary to show actionable fraud are: (1) The making of the promises; (2) that the plaintiff relied upon and had a right to rely upon them; (3) that he was induced thereby to, and did, make the conveyances; (4) that the defendants have not performed the acts promised, and had no intention of doing so at the time of making them.

The complaint states facts sufficient to entitle the plaintiff to have the deeds set aside, and the property restored to him on the ground of fraud; and the demurrer thereto was properly overruled.

2. The appellants further maintain that the judgment is not supported by the findings, and that, under the facts as found, the judgment should have been for the defendants. It will be noticed that upon the question of fraud the findings are in favor of the defendants. The finding is that "there were no false representations nor fraud in fact."

This effectually disposes of that branch of the complaint, and leaves the plaintiff to depend, for a recovery, upon a failure of consideration. This brings us to a consideration of the question whether the facts alleged in the complaint, and found by the court, show such a failure of consideration as will authorize the setting aside of a deed conveying real estate.

It seems to us that, shorn of the question of fraud, the complaint and findings present the plain, simple question whether a conveyance of real estate, fully executed on the part of the grantor, can be set aside for a failure of consideration on the sole ground that the promises and agreements which induced its execution, and which, by the terms of the contract under which the deed is made, were not to be performed until after its execution, have not been performed. The plaintiff saw proper to accept the verbal promise of the defendants to do certain things without any agreement or understanding that the failure to do the acts as promised should be a condition, or in any way effect the validity of the deed, or entitle him to a reconveyance. Counsel for the respondent say that the reasonable inference from the continued failure and refusal to comply with their promises is that the defendants did not intend to comply with them at the time they were made, but this is an argument in the face of the direct finding of the court that there was no fraud. This is a finding against the contention that they had no intention of performing their part of the contract, as the making of the promises and the failure to perform are clearly found. We are compelled to treat the case as one where the promise was made in good faith, but has not been performed.

Mr. Waterman, in his work on Specific Performance, section 189, says: "With regard to the failure of the consideration as a defense, it is scarcely necessary to say that by this is not meant the non-payment of the purchase money according to the agreement,—the liability to pay, though default be made, being a consideration,—but the failure of the contract by the occurrence of something which either determines the existence of the subject matter, or materially affects it. If the subject-matter be not essentially affected, though there may be a claim for compensation, the party injured will not be entitled to be discharged from the contract. Events which, happening before the conclusion of a contract, avoid it, either by determining the existence of the subject-matter or materially affecting it, do not, properly speaking, terminate the contract, but prevent the contract from arising."

It must be borne in mind that the plaintiff did not contract to convey upon the performance of the contract on the part of the defendants; therefore his promise was not dependent upon theirs, nor was there anything appearing in the deed, or in the contract under which it was made, showing, or tending to show, that a compliance with their promises was regarded as a condition subsequent, or that a failure to perform on their part should in any way affect the title conveyed to them. The case is precisely the same in principle as if the plaintiff had conveyed and taken a note for the purchase money, and the defendants had failed to pay the same. The fact that the promise is to expend money in making certain improvements, instead of a promise to pay money to the plaintiff, can make no difference as to the right to rescind on the ground that the grantees have failed to perform the covenants on their part. Certainly it would not be seriously contended that the mere failure by the vendee to pay the purchase money could entitle the vendor to rescind the contract, and recover back the land; and yet that is the ground upon which the plaintiff in this action must recover under these findings, if at all.

Counsel for respondent rely upon section 1689 of the Civil Code. In our judgment the section referred to has no application to a case like this, where the vendor has waived actual performance on the part of the vendee, by relying upon his mere promise to perform, and, relying upon such promise to perform in the future, has executed the conveyance, thereby vesting the title to the property in his grantee. The contract on the part of the vendor is wholly executed. If the mere promise, and the failure to perform, is not sufficient to set aside a deed on the ground of fraud, as we have shown, the fact that the same acts are characterized in the pleading as a failure of consideration cannot give them additional force, and thereby bring about the same result. The case of *Hartman* v. *Reed*, 50 Cal. 485, is in point against the respondent. There the conveyance was of an undivided interest in an unconfirmed Mexican grant, and the consideration was the agreement of the vendee to prosecute to a final determination before the board of land commissioners and the courts of the United States the claim of vendor to the said rancho, which agreement was not performed. It was said in that case: "The title to the undivided third of the rancho vested absolutely in Crosby, and his agreement did not constitute a condition, upon a breach of which the title would revest in Olvera; but a breach of the agreement only gave Olvera a cause of action for damages."

Leaving out of sight the question of fraud, which, as we have seen, was found against the respondent by the court below, the case cited and the one before us are identical in principle. Such a rule may work hardship in individual cases, and this may be one of those cases, but to hold that a vendee of real estate could, for a failure to pay the purchase money, repudiate his deed, and recover the land, would render real-estate titles dangerously uncertain, and result in the most serious consequences. The judgment is not sustained by the findings.

The complaint in this case and the prayer for relief were such as to entitle the plaintiff to a judgment for damages, and, as his right to such recovery was not passed upon, the judgment and order appealed from are reversed, with instructions to the court below to grant a new trial, and allow the parties to amend their pleadings, if they so desire.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.; PATERSON, J.

JOHN H. FREEZER ET AL. v. ELIZA SWEENEY.

(8 Montana 508; 21 Pac. 20. Supreme Court. February 2, 1889.)

[1]**A stone quarry** may be located as a placer claim.

Misdesignation in location certificate. The fact that the locator in his certificate describes the claim as a "placer mining or stone quarry claim" does not limit his rights to the stone quarry, but he is entitled to all mineral found therein, excepting known lodes.

The stenographer's notes of the testimony may be read to the jury after their retirement, when they return into Court asking to be refreshed on the evidence.

Appeal from District Court, Lewis and Clarke County; McCONNELL, Judge.

Action by John H. Freezer and others against Eliza Sweeney. Judgment for defendant, and plaintiffs appeal.

SHOBER & ADAMS, for appellants.

COMLY & FOOTE, for respondent.

DEWOLFE, J. This was an action brought to determine the right of possession of a mining claim, brought in pursuance of section 2326 of the Revised Statutes of the United States.

The plaintiffs claim the right of possession to the premises by a location thereof as a placer claim, on the 14th of May,

[1]This case was decided before the passage of the Act of 1892, now in force, 27 St. L. 348, which makes special provision for location of lands chiefly valuable for building stone as placers. The text case is disapproved in *Wheeler* v. *Smith*, 5 Wash. 704; 32 Pac. 784, as to the point stated in first syllabus.

A location on building stone land cannot be patented as a lode claim. *Long* v. *Isaksen*, 23 L. D. 353. *Wheeler* v. *Smith*, Id. 395.

Lands chiefly valuable for building stone are mineral and reserved from R. R. grant. *N. Pac. Ry.* v. *Soderberg*, 99 Fed. 506; 104 Fed. 425; Affd. 23 S. C. R. 365.

1887. The defendant claims possession by a location thereof made by herself and Thomas Purcell on the 23rd of March, 1886, and a subsequent conveyance by Purcell and his wife to defendant of their interest in said mine. In the location made by Purcell and defendant the claim is described as a "placer mining or stone-quarry claim." The defendant subsequently filed her application in the local land-office in Helena for a patent to the claim, describing it as a "placer mining claim." The plaintiffs filed an adverse claim to the application, and thereafter instituted suit, within the statutory time, to determine the right of possession to the disputed premises.

A trial by jury was had in the district court, and special questions of fact submitted to them, on all of which, as also in their general verdict, the jury found in favor of the defendant, and a judgment and decree were entered accordingly, and a motion for a new trial being made was overruled. To review these proceedings this appeal is prosecuted.

Several exceptions were taken by the appellants during the trial to the rulings of the court in the admission of evidence, and to the instructions given and refused. Such of these as are deemed of importance we will proceed to consider. The first we will notice is found on page 74 of the record, in which the court, against the objections of the plaintiffs, at the request of the jury, permitted the evidence of the witnesses Purcell and Decker to be read to the jury from the reporter's notes, after the jury had been charged by the court, and had retired to consider as to their verdict. This is alleged as error.

Section 266 of the Code of Civil Procedure prescribes what papers may be taken by a jury upon retiring for deliberation, and this section expressly excludes depositions from being taken. But the next section provides: "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be

informed on any question of law arising in the cause, they may require the officer to conduct them into court. Upon being brought into court, the information required shall be given in presence of or after notice to the parties or counsel." Code Civil Proc. § 267. This section seems to contemplate the course of proceeding followed by the court. But it is further objected that the testimony, as read from the stenographer's notes, was secondary, and therefore inadmissible, if the witnesses themselves could have been produced. To this it may be replied that the stenographer is a sworn officer of the court, and the notes taken by him of the evidence are presumed to be correct until shown to be otherwise. This was not done or attempted, and hence the evidence as read from the notes is presumed to have been the statements made by the witnesses.

In addition to this, it may be said that the court, under the statute, has no authority to reopen the case by recalling witnesses and admitting new or additional testimony. It is where the jury differ as to the testimony already given that the court is authorized to give the information asked; and that information is, as said, presumed to be in the notes of the stenographer. The information asked and given must be of testimony already given, and not new testimony or statements of witnesses given for the first time. *Russell* v. *Dennison*, 45 Cal. 338.

The plaintiffs requested the court to give to the jury 23 separate instructions, which the court refused, and to this refusal exceptions were taken.

Space does not admit of a separate examination of these instructions. It is believed that a more intelligent examination can be given them by a discussion of the general propositions to which they relate than by an attempt to pronounce upon them separately. The substance, at least, of some of these instructions was given by the court to the jury. Thus, the first instruction by the court is identical in principle, though

not in form, with the first instruction asked by plaintiffs and refused by the court. Most of the instructions refused relate to the validity or sufficiency of the location of the premises by defendant or her grantor as a "placer mining or stone-quarry claim," and whether, under such a designation and description of the claim, she could apply for a patent for the premises as a "placer claim." In other words, whether the defendant and her co-locator, having in their recorded notice of location designated the claim as a "placer mining or stone-quarry claim," are not limited and restricted in their rights to the stone-quarry found within the claim, without acquiring a right to the placer or other mineral deposits found therein.

The question is an interesting one, and we have not been referred to, nor have we found, any direct adjudication on the subject; but the commissioner of the land-office, in the case of *Montague* v. *Dobbs*, 9 Land-Owner 165, and also in the application made for a patent by P. H. Bennett, reported in 3 Pub. Land Laws 116, held that land containing layers or deposits of kaolin, and quarries of stone valuable for building purposes, could be located as placer claims under the provisions of section 2329 of the Revised Statutes of the United States. That section is as follows: "Claims usually called 'placers,' including all forms of deposit, excepting veins of quartz or other rock in place, shall be subject to entry and patent under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but, when the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands."

This section extends and enlarges the signification commonly given to "placer claims," and makes such locations include all forms of deposit, excepting quartz veins or other rock in place. The officers of the land department have construed it as embracing quarries of rock valuable for building

purposes, as already stated, and we do not doubt the correctness of this construction.

It is not presumable that the government of the United States intended to deprive its citizens of the use of, or means of acquiring title to, something so necessary and indispensable as rock or stone is for building purposes; and, if the land in which rock or stone-quarries are found cannot be taken up under the provisions of the section mentioned, no provision of the land laws is known under which title to such deposits can be acquired, when they are found outside of lands valuable for minerals (strictly speaking), or outside of agricultural lands, title to which can be acquired under the pre-emption and homestead laws.

Congress, in 1878, passed an act for the acquisition of title to timber lands, and lands valuable for stone, but by its terms it is made applicable only to the states of California, Oregon and Nevada.

Holding, then, that the premises in controversy could be located, and thereafter patented, as a placer claim, under the provisions of the mining law of the United States, the next question that arises in the case is whether the defendant and her co-locator, having located the claim as a "placer mining or stone-quarry claim," are restricted and limited by the terms of the location as to the stone-quarry found within the claim, or are entitled to all mineral deposits found therein; and also, in applying for a patent for the claim, wherein it was described as a "placer claim," without reference to the terms of the location as a "stone-quarry," whether this was a misdescription that deprived her of any rights.

Section 2329 of the Revised Statutes of the United States, it will be observed, contains no requirement as to the particular nature or character of any location authorized under that section, but groups them all under the general appellation of "placer claims," nor does that or any other section of the mining law of congress require a record of a placer claim. A

record is made necessary only by the territorial law, and that law (section 1477, div. 5, Gen. Laws) requires placer claims, including building stone and other forms of deposit, to be filed for record within 20 days after location; the record to contain a description of the same in the manner prescribed by the laws of the United States. The laws of the United States make no requirements concerning a record of a placer claim, as they do respecting locations upon veins or lodes. Sec. 2324, Rev. St. U. S. Nor does the law require any staking or marking of the boundaries of a placer claim, as it does in the location of a lode claim; but the placer claim, when made on surveyed lands, must conform to the legal subdivisions of such surveys. See section 2329, Rev. St. U. S. And a reference to such legal subdivision is sufficient in a record notice of location.

The record of the locations of the claim in controversy, by both plaintiffs and defendant, appears to have been in conformity with the requirements of the statute, and the location notices were therefore properly admitted in evidence. Nor is there any requirement under the laws of the United States, or of this territory, (if it be assumed that the territory could make any law on the subject,) which requires the owner of a placer claim, whatever be its character, when he makes application for a patent, to designate the particular use or character of the placer claim, provided it is such as is contemplated by section 2329, referred to. It is sufficient to designate it as a placer claim, without any description as to kind or quality; and, if the record of location contains words of description defining the use or purpose for which it was located, such words in no way abridge the rights of the owner, but should be treated as surplusage in any application for a patent.

If it is a placer claim, the owner is entitled to all the mineral deposits contained therein, excepting only veins or lodes of quartz, such as are described in section 2320, Rev. St. U. S.

Applying these principles to the case now under consideration, the defendant, with another, located the claim in dispute

on the 23rd of March, 1886, and filed in the recorder's office of the proper county a notice of location on the 7th of April, 1886, being within the 20 days required by law. This location was more than a year prior to the location made by plaintiffs; and, no abandonment or forfeiture being alleged or shown on the part of the defendant, we must hold, as we do, that the defendant had the right to the possession of the claim in dispute that the instructions given by the court to the jury were, in the main, correct,—and, if erroneous, they stated the law more favorably for the plaintiffs in one or two respects than they should have done; that the plaintiffs were not prejudiced thereby; and the general verdict of the jury, and judgment and decree based thereon, were correct, and are therefore affirmed.

Judgment affirmed.

BACH and LIDDELL, JJ., concur.

JOHN GALE v. S. M. BEST ET AL.

(78 California 235; 20 Pac. 550; 12 Am. St. Rep. 44. Supreme Court. February 18, 1889.)

[1]**The patent an adjudication of non-mineral character.** When a law of congress provides for the patenting of lands upon the ascertainment of certain facts, the land department has jurisdiction to inquire into such facts; and the issuance of the patent is a finding in favor of the patentee that the lands are patentable.

And thereafter such facts, as for instance, the mineral or non-mineral character of the land, cannot be collaterally inquired into.

The Federal construction of the grants of the United States must prevail against local interpretation.

R. R. Patentee holds against Mining Locator. Where land is patented to a railroad, under a grant providing for its disposal as agricultural land, without any reservation in the grant except a general one of mineral lands, and no reservation in the patent, the patent is a conclusive determination by the government that the land is agricultural; and in an action at law to recover possession, by one claiming title under the company, against persons claiming under a location of a mining claim upon the public domain, the character of the land cannot be brought in question.

In bank. Appeal from superior court, Butte county; LEON D. FREER, Judge.

[1]*Dreyfus* v. *Badger*, 108 Cal. 58; 41 Pac. 279.

Buena Vista Co. v. *Tulare Co.* 67 Fed. 226.

Gold discovered on railroad lands after title has vested by full performance of the conditions does not defeat the title. After such date prospectors have no right to enter. *Francoeur* v. *Newhouse*, 40 Fed. 618.

Mineral lands are lands known to be mineral or believed to be mineral when the grant took effect. *Francoeur* v. *Newhouse*, 43 Fed. 236.

An agricultural patent may be impeached by showing that at date of final proof it was known to be mineral land. *Kansas City M. Co.* v. *Clay*, (Ariz.) 29 Pac. 9.

Coal lands are mineral lands and do not pass under school grants. *Mullan* v. *U. S.* 118. U. S. 271.

Under the Northern Pacific Railroad grants all mineral lands except coal and iron, whether known or unknown, are excluded. *Barden* v. *N. P. R. R.* 154 U. S. 288.

Action by John Gale against S. M. Best, J. W. Reams, J. H. Bassford, Calvin Reams, and L. B. Abernathie, to recover possession of the S. W. ¼ of section 27, township 24 N., of range 3 E., Mount Diablo base and meridian, situate in Butte county, Cal. Judgment for plaintiff, and defendants appeal.

GRAY & SEXTON and W. S. RILEY, for appellants.

HUNDLEY & GALE, for respondent.

MCFARLAND, J. This is an action to recover possession of certain land, and to restrain defendants from doing certain acts thereon in the nature of waste. Judgment went for plaintiff, and defendents appeal from the judgment, and from an order denying a motion for a new trial.

The land in contest is within the limits of the grant of lands by congress to the California & Oregon Railroad Company, a corporation; and on March 17, 1875, the government of the United States executed and delivered its patent, in due form of law, to the Central Pacific Railroad Company, a corporation, successor to said first-named corporation, by which it

Otherwise as to unknown minerals on Central Pacific grant. *Francoeur* v. *Newhouse*, 40 Fed. 618; 43 Fed. 236.

Agricultural patent on mineral land held void. *U. S.* v. *Culver*, 52 Fed. 81.

Sufficient proof of mineral character to exclude from Railroad grant. *Valentine* v. *Valentine*, 47 Fed. 597.

Under grant of land to a Railroad excluding minerals, the company holds prior to patent, a defeasible title and after patent, the fee. *Adams* v. *Reed*, 11 Utah 480; 40 Pac. 720.

To make agricultural entries invalid, mines must be known at the time of entry and traces of old abandoned workings are not enough. *U. S.* v *Blackburn*, (Ariz.) 48 Pac. 904.

Lands known to be mineral at date of patent are excepted from Railroad grants. Rights of bona fide purchaser of such lands. *U. S.* v. *Central Pac. R. R.* 84 Fed. 218.

Only "valuable" mineral deposits are intended in the reservations contained in Acts of Congress. *Deffeback* v. *Hawke*, 115 U. S. 404. And that value must have been known. *Olive Co.* v. *Olmstead*, 103 Fed. 568.

judgments in this court, and in others of high authority, to permit the validity of the patent to the state to be subjected to the test of the verdict of a jury on such oral testimony as might be brought before it. It would be substituting the jury, or the court sitting as a jury, for the tribunal which congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey."

In *Steel* v. *Smelting Co.*, *supra*, Justice FIELD, whose exhaustive opinion we cannot here undertake to reproduce, among other things, says as follows: "We have so often had occasion to speak of the land department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on that subject. That department, as we have repeatedly said, was established to supervise various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the different requirements of acts of congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions." And again, speaking of the lands held by the possessor of a patent, he says: "If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the land department, and the correctness of its rulings upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would

recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to another conclusion. So his rights in different suits upon the same patent would be determined, not by its efficiency as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence." 104 U. S. 641. And the pith of the whole matter, is aptly expressed by the same learned justice in *Smelting Co.* v. *Kemp*, *supra*, where, speaking of the land department, he says: "Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances existed." 104 U. S. 646.

It is contended by appellants that former decisions of this court, in *McLaughlin* v. *Powell*, 50 Cal. 64; *Carr* v. *Quigley*, 57 Cal. 394, and *Chicago Q. M. Co.* v. *Oliver*, 75 Cal. 194—are in conflict with the doctrine above stated. Whether or not there be any expressions in the opinion in either of those cases inconsistent with the views of the highest federal court on the subject, (which views, in the end, on a question like this must prevail), it is not necessary here to consider. In order to affirm the judgment in the case at bar there is no necessity to upset either of those cases. In *McLaughlin* v. *Powell* the patent itself expressly excepted "all mineral lands, should any be found to exist, in the tracts" embraced by the patent. And the decision is expressly put upon the ground that there was that exception, and that it was "part of the description" of the lands conveyed. And it may be strongly argued that, in such case, although it was the duty of the land department to determine the character of the land before the issuance of the patent, yet, as the patent shows upon its face that such duty was not performed, the patentee must be held

to have taken it, knowing its uncertain and unsubstantial character. On the other hand, Judge SAWYER has held, in an opinion of great force and ability, that the issuance of a patent in such a case was a conclusive declaration that the land was of the character to be properly patented under the law—that is, agricultural land; that there is no authority to make in such a patent a general reservation of mineral lands, any more than there is in case of a pre-emption patent; and that such a reservation is void. *Cowell* v. *Lammers*, 10 Sawy. 246, 21 Fed. Rep. 200. At all events, as in the case at bar, the patent contains no reservation whatever, the case of *McLaughlin* v. *Powell* is not authority here. And the same may be said of *Mining Co.* v. *Oliver*. In that case the patent also excepted "all mineral lands, should any be found to exist," etc. *Carr* v. *Quigley* is not in point at all. In that case there was no question about the character of the land patented. It was claimed to be within a "government reservation," and that the body of land itself involved in that case, without reference to its character, was expressly reserved from the operation of the law under which the attempt was made to patent it. Our opinion is that where a patent issues for public land under a law which provides for its disposal as agricultural land, either to a railroad company, or to pre-emption or homestead claimants, and there is no reservation in the law, except a general one of mineral lands, and no reservation at all in the patent, then the patent must be considered as a conclusive determination by the government that the land is agricultural; and afterwards, in an action in a court of law, it is not competent to reopen the question of the character of the land. The opposite view would render the titles to a large region of California, now rapidly filling up with agricultural settlers, unstable, insecure, and almost worthless. It would affect, also, those holding through patents under the pre-emption and homestead laws, for mineral lands are exempted from the provisions of those laws. The theory of that view is that if

the land previously patented as agricultural can at any time be shown to be in fact mineral, then the title to it never passed from the United States, but it had always remained a part of the public domain; and, as no statute of limitations runs against the government, the insecurity of the title under the patent would be perpetual, and an attack upon it could be made as successfully 100 years hence as now. Such, in our opinion, is not the law.

The view taken of the question presented by the court below was correct, and we see no error in the record.

Judgment and order affirmed.

We concur: WORKS, J.; PATTERSON, J.; THORNTON, J.; SHARPSTEIN, J.

WOODWORTH ET AL. v. MCLEAN ET AL.

(97 Missouri 325; 11 S. W. 43. Supreme Court. March 4, 1889.)

[1]**Contract to sink on vein. Vein disappears.** Defendant stipulated to sink a mining shaft five hundred feet "on the vein of ore cropping out on said claim." If, in the progress of the work, all indications of valuable material ceased and the vein of ore ran out entirely, there was no obligation on him to proceed further.

Burden on contractor to prove lost vein. When, in a suit for damages on account of a failure to execute such contract, it is proved that the work stopped within the five hundred feet, the burden of proof rests on defendant to show that the vein of ore, down which the shaft was to proceed, had terminated.

[2]**Measure of damages.** The measure of damages for failing to continue such a mining excavation to the point fixed by contract is the reasonable price or value of the work necessary to complete the agreed depth. But this rule does not apply in this case unless the vein of mineral continued beyond the point where defendant ceased work.

Appeal from St. Louis Circuit Court: AMOS M. THAYER, Judge.

Action for breach of contract. Verdict and judgment for plaintiffs for nominal damages. Plaintiffs appeal.

BOYLE, ADAMS & MCKEIGHAN and J. A. HARRISON, for appellants.

[1]On contract to sink shaft deeper held that it was intended contractors should follow the pitch of the upper part of the shaft, not follow the pitch of the vein. *Buckeye Co.* v. *Carlson*, 16 Colo. App. —; 66 Pac. 168.

[2]Measure of damages on breach of contract to furnish a mining plant, drive a tunnel etc., where the contract was evidently based on expected reimbursement out of the mine. *Cleopatra Co.* v. *Dickinson*, (Wash.) 68 Pac. 456.

Measure of recovery for shaft the sinking of which was ordered stopped before complete. *Mooney* v. *York Co.* 82 Mich. 263; 46 N. W. 376.

Where timbering not mentioned the contractor is not bound to timber the shaft. *No. 5 Co.* v. *Bruce*, 3 M. R. 146.

FISHER & ROWELL, for respondents.

BARCLAY, J. Plaintiffs brought their action against McLean to recover $30,000 damages for breach of a written contract regarding certain mining operations. Since the judgment in the Circuit Court, the defendant McLean died. The present defendants are his legal representatives. Plaintiffs were owners of a mining claim in New Mexico, and conveyed to McLean two-thirds of it as a consideration for the contract in question. It was intended by its terms to secure the development of the claim. It provided that McLean, at his own expense, should cause a shaft to be sunk to "the depth of 500 feet on the vein of ore cropping out on said claim," within two years from December 28, 1882. It required the shaft to be at least 5 by 7 feet, with cross-cuts every 100 feet, and contained many details of agreement not necessary to repeat. The plaintiffs' evidence at the trial tended to show that McLean sunk the shaft, as agreed, to a depth of 330 feet, but refused to carry it further. There was evidence for defendant to the effect that the work was stopped at that point because the vein of mineral had given out entirely. The instructions which the court gave the jury, regarding the points of vital difference between the parties, are as follows: viz. "(3) The court instructs you that it stands admitted that the contract sued upon was executed by the defendant, and that the shaft agreed to be sunk was only sunk to a depth of 330 feet. You will accordingly find a general verdict for the plaintiffs, and the measure of plaintiffs' damages is such sum as you believe from all the evidence it would cost the plaintiffs to sink the shaft in question, with cross-cuts every 100 feet, from the level of 330 feet to the depth of 500 feet, as specified in the contract. And in estimating such cost you will make allowance for the necessary expense of procuring and setting up at the mine the necessary machinery for doing the work, deducting from such cost of machinery what you

believe from the evidence such machinery would be reasonably worth at the mine when the shaft was completed. (4) The foregoing rule as to the measure of damages is subject, however, to this qualification, namely: If, from the testimony in the case, you believe and find that the sinking of the shaft in question to the depth of 500 feet would not have led to the development or discovery of any valuable deposits of gold or silver, or other valuable mineral, in paying quantities, and would not have benefited the plaintiffs to any greater extent than they were already benefited by sinking the shaft to the depth of 330 feet, then you may assess the plaintiffs' damages at a mere nominal sum. (5) The burden of showing that the sinking of the shaft to the depth of 500 feet, with crosscuts each 100 feet, would not have led to the development or discovery of any valuable mineral deposits, and would not have benefited the plaintiffs, rests upon the defendant, and he must show such fact to your reasonable satisfaction. But, in determining that issue, the court instructs the jury that they may take into consideration the opinions of the various experts who have testified on that subject, and all of the facts and circumstances given in evidence upon which the opinions of such experts, or any of them, were based." Plaintiffs preserved exceptions to these declarations of law. There was evidence sufficient to support the instructions, leaving out of view the question of the construction of the contract. Some special issues were submitted to the jury, but they need not be discussed. There was a finding for plaintiffs for nominal damages, from which they have appealed.

Plaintiffs regard this contract as obliging McLean to sink the shaft 500 feet in any event, irrespective of all intermediate developments. Their entire argument here rests on that assumption. We think the language of the agreement does not reasonably bear that interpretation. Its intent and purpose were to secure a development of the claim in a manner to "subserve the mutual interests of the parties," and on the

completion of the work, two-thirds of the shaft (as part of the entire claim) was to belong to McLean. The latter stipulated to sink the shaft 500 feet "on the vein of ore cropping out on said claim." If, in the progress of the work, all indications of valuable mineral ceased, and the vein of ore ran out entirely, there was no obligation on McLean to proceed further. The question whether the vein of ore had ceased is one of fact, to be tried in the usual way. As the work stopped within the 500 feet, the burden of proof rested on him to show that the vein of ore, along which the shaft was to proceed, had terminated, for the contract itself asserts the existence of the vein at the beginning. But on establishing that fact, the requirements of the contract would be met, and there would be no breach whatever. The measure of damages for failing to continue a mining excavation, such as this, to the point fixed by contract, is the reasonable price or value of the work necessary to complete the shaft to the agreed depth. But this rule is not applicable, in view of the language and evident purpose of the contract here considered, unless the vein of mineral continued to the point where McLean ceased work. The instructions given in the Circuit Court were based on the premise that the contract required the shaft to be sunk 500 feet in any event. In the main they were, perhaps, more favorable to the plaintiffs' claim than the views we have expressed. But plaintiffs are entitled to have the case correctly tried. The evidence preserved in the record is not sufficiently satisfactory, in its bearing on the decisive issue of fact above indicated, to justify an affirmance on the theory that plaintiffs were not prejudiced by the error of the trial court in the construction of the contract. Accordingly it will be *ordered that the judgment be reversed*, and the cause remanded, unless plaintiffs, during the present term, dismiss their appeal, which they may do if so advised. All the judges concur.

The plaintiffs having elected not to dismiss their appeal the judgment was accordingly reversed and cause remanded.

[1]SCHULTZ ET AL. V. KEELER ET AL.

(2 Idaho 531; 21 Pac. 418. Supreme Court. March 18, 1889.)

[2]**Right to instruction on agent's power to locate.** Where the complaint declared for the claim as one located by an agent, and the answer admitted that the claim if valid was one so made by an agent, the right of an agent to locate became a material point on the pleadings, and the plaintiff was entitled to an instruction that an agent could make a valid location for his principal.

A point decided on first appeal becomes the law of the case without need of re-affirmance.

Appeal from District Court, Shoshone County.

[1]S. C. on former appeal, 2 Ida. 306.

[2]*Rush* v. *French*, (Ariz.) 25 Pac. 816; *Dunlap* v. *Pattison*, (Idaho) 42 Pac. 504.

An agent's purchase is ratified when principal takes possession though contract was made in agent's name. *Hall* v. *White*, 123 Pa. 95; 16 Atl. 521.

Clerk in a mining store is not an agent upon whom process may be served. *Blanc* v. *Paymaster Co.* 95 Cal. 524; 30 Pac. 765.

Parol proof allowed to show whether party signed contract as manager. *Caffrey* v. *Omilak Co.* (Cal.) 36 Pac. 388.

Parties dealing with general agent of foreign corporation have the right to assume that he has full powers. *Rathbun* v. *Snow*, 123 N. Y. 343; 25 N. E. 379. Superintendent has right to buy current supplies. *Stuart* v. *Adams*, 89 Cal. 367; 26 Pac. 970.

An agent acting in bad faith forfeits commissions. *Williams* v. *McKinley*, 65 Fed. 4.

Distinction between agent and lessee. *Id.*

Agent held personally liable in a suit for depositing tailings. *Hindson* v. *Markle*, 171 Pa. 138; 33 Atl. 74.

One who undertakes to make a sale becomes an agent. *Fisher* v. *Seymour*, 23 Colo. 542; 49 Pac. 30.

Commission deducted from purchase money where agent had falsely understated amount. *Henry* v. *Mayer*, (Ariz.) 53 Pac. 590.

Instance of collusive submission by agent to hostile title. *Id.*

An agent cannot relocate his principal's claim. *Argentine Co.* v. *Benedict*, 18 Utah 183; 55 Pac. 559.

Company presumed to know of the fraud of its agent. *Id.*

Contract of sale in name of agent: after discovered principal not liable. *Badger Co.* v. *Drake*, 88 Fed. 48.

W. B. HEYBURN and W. W. WOODS, for appellants.

ALBERT ALLEN and RICHARD Z. JOHNSON, for respondents.

LOGAN, J. This action is in the nature of ejectment, brought to recover the possession of certain placer mining ground, situated in Shoshone county. The case was tried before the court with a jury. Verdict and judgment in favor of the defendants. The appeal is from the judgment only, but the judgment roll contains the complaint, answer, and bill of exceptions.

The complaint alleges that on the 11th day of June, 1883, the plaintiffs, jointly with one Jesse A. Pritchard, by their attorney, A. J. Pritchard, made a certain mining location in pursuance of the act of congress of May 10, 1872.

The answer admits that the pretended ownership of the mining ground described in the plaintiffs' complaint is based upon a pretended location thereof by one A. J. Pritchard, as the agent of the plaintiffs.

Although we have no evidence before us, taken at the trial as to this point, yet we have this allegation of the complaint and the admission by the answer. It was therefore proper for the plaintiffs to request the court to charge that a valid location of a mining claim may be made by a duly authorized agent in the name and in the absence of the principal, and that

May offset collection against wages. *Hood* v. *Hampton Co.* 106 Fed. 408.

Principal cannot accept benefits and repudiate agency. *Genter* v. *Conglomerate Co.* 23 Utah 165: 64 Pac. 362.

No authority to sell the future product of the mine; agent had contracted for more than the mine could produce. *Blackmer* v. *Summit Co.* 187 Ill. 32; 58 N. E. 289.

Person dealing with an agent when agent's authority is in writing is bound to take notice thereof. *Id.*

Mine manager has no power to bind the corporation for medical services to injured employees. *Spelman* v. *Gold Co.* 26 Mont. 76; 66 Pac. 597. But see *Mt. Wilson Co.* v. *Burbridge*, 11 Colo. App. 487; 53 Pac. 826.

when such location is once proved it as completely segregates the ground so located from the public domain as though located and held by the locator in person. The fact of the location by an agent was in the case as fully as it would have been had there been evidence. It was absolutely necessary for the plaintiffs, in making out their case, to prove this allegation; and they could only prove it in the manner alleged.

The answer having admitted the manner of location, evidence of the manner might not be necessary, but it furnishes no excuse for the court to refuse to instruct upon that subject, because the plaintiffs' whole claim, and the validity of their location, depended upon the question whether it could be made by an agent. It is unnecessary for us to go into the question as to whether this request to charge is proper or not. It was the law of this case, for the reason that the same question had been presented in the same action on a former appeal (13 Pac. Rep. 481), and the charge was there held to be proper. In that opinion we certainly concur.

For the refusal of the court to charge as requested, *the judgment is reversed, and a new trial ordered.*

WEIR, C. J., and BERRY, J., concur.

PARLEY'S PARK SILVER MINING COMPANY v. KERR.

(130 U. S. 256. Supreme Court. April 1, 1889.)

Right of Owner in possession to quiet title. In Utah a complaint which alleges that the plaintiff is owner and in possession of land, that the defendant claims an adverse interest or estate therein, that such claim is without legal or equitable foundation and is void, and that it is a cloud on the plaintiff's title and embarrasses him in the use and disposition of his property and depreciates his property, and which prays for equitable relief in these respects, is sufficient to require the adverse claim on the part of the defendant to be set up, inquired into and judicially determined, and the question of title finally settled.

[1]**District Rules determinable in Land Office.** The question, under Rev. Stat. § 2319, as to what customs and rules of miners in a mining district not inconsistent with the laws of the United States are in force in the district when an application is made for a patent on mineral land, is one of fact determinable by the Commissioner of the Land Office.

District rule adopting terms of statute. Rule 4 of the rules of the Blue Ledge mining district in Utah, adopted May 17, 1870, limiting the width of a mining location to 200 feet, was so modified May 4, 1872, that thereafter the surface width was to be governed by the laws of the United States.

Appeal from the Supreme Court of the Territory of Utah.

The case is stated in the opinion.

Mr. J. G. SUTHERLAND and Mr. J. R. MCBRIDE for appellant.

Mr. CHARLES W. BENNETT for appellee.

Mr. JUSTICE LAMAR delivered the opinion of the court.

[1]District Rules once proved to exist are presumed to continue. *Riborado* v. *Quang Pang M. Co.* 2 Idaho 131; 6 Pac. 125.

Superseded by Act of Congress as to labor. *Original Co.* v. *Winthrop Co.* 60 Cal. 631. But see Contra *Northmore* v. *Simmons*, 97 Fed. 386.

A district rule cannot fix the fee of the Recorder for filing a location; the Statute controls. *People* v. *Monk*, 8 Utah 35; 28 Pac. 1115.

This action was brought in a district court of the Territory of Utah on the 14th of September, 1880, by the appellant, Parley's Park Silver Mining Company, to establish the validity of its title to certain mining property in Utah, and to have annulled the adverse claim of the appellee, John W. Kerr, to an estate or interest in said property.

The suit was founded upon § 1479, Compiled Laws of Utah, § 254 of the Practice Act, which is as follows: "An action may be brought by any person in possession by himself or his tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate, or interest."

The complaint sets forth the cause of action in the very terms of this section, alleging, in effect, that the plaintiff is owner, subject only to the paramount title of the United States, and in possession of the lands in question; that the defendant claims an adverse interest or estate therein; that the said claim is without legal or equitable foundation and void; and that it is a cloud on plaintiff's title, embarrasses him in the use and disposition of the property, and depreciates its value. Therefore, he prays (1) That the defendant may be required to set forth the nature of his claim, and that all adverse claims of the defendant may be determined by a decree of the court. (2) That by said decree it be adjudged that the defendant has no interest or estate whatever in said land, and that the title of the plaintiff is valid and good. (3) That the defendant be enjoined against asserting any adverse title to the said land or premises.

The defendant in his answer denies the plaintiff's ownership and possession, and sets up a paramount title in himself based upon a patent to him from the United States embracing the land in question.

The facts agreed upon by the parties and adopted by the court as findings are substantially as follows: Two mining claims in the Blue Ledge mining district of Utah, known as

the Central mining claim and the Lady of the Lake mining claim, together with all the estate and interest therein, were conveyed to the plaintiff by the original locators and their grantees. At the time of the commencement of the suit there was no actual possession of the premises in question, but the plaintiff had, according to the mining laws of the district, possession of parts of those two mining claims, and, according to those laws, such possession is also possession of the disputed premises, provided they are rightfully a part of the Central and Lady of the Lake claims, and not the property of the defendant under his patent for the Clara mining claim. This mining claim patented to the defendant is overlapped by the two claims of the plaintiff, and this overlapped portion constitutes the premises in controversy. The plaintiff and its grantors had done the work required by law on its mining claims, but had not at the time obtained a patent for either.

The Lady of the Lake mining claim was located July 25, 1875, and was surveyed for patent July 8, 1876.

The Central mining claim was located August 19, 1876, was surveyed for application for patent August 2, 1880, and application for patent was made by the plaintiff or its grantors soon thereafter.

The Clara mining claim was located July 28, 1872, was surveyed for patent March 31, 1876, was entered and paid for February 20, 1879, and the patent itself was issued February 6, 1880, to the defendant, and held by him at the commencement of the suit.

It is also agreed that "during the 60 days' publication of the notice of application for patent for the Clara mining claim and mill site, the owners of the Lady of the Lake mining claim filed in the United States Land Office an adverse claim against said application for patent, and thereby made an adverse claim to the areas in conflict between the Lady of the Lake mining claim and the Clara mining claim and Clara mill site. On the 25th day of July, 1876, agreements in writing were

made between the owners of the Lady of the Lake mining claim and the applicants for patent for the Clara mining claim and mill site, as follows: An agreement whereby the owners of the Clara mill site relinquished their application for patent for so much thereof as conflicted with the Lady of the Lake mining claim, and the owners of the Lady of the Lake mining claim agreed, in consideration thereof, to prosecute their application for patent for said claim with diligence, and when patent was obtained to convey to the owners of said mill site or their assignees the area in conflict between said mill site and said Lady of the Lake mining claim, excepting and reserving, however, to the owners of the Lady of the Lake mining claim any mineral vein under the surface of said conflict area, and also the right to mine and extract any minerals therein. And the owners of the Clara mining claim agreed not to protest the application for patent for the Lady of the Lake mining claim, and at the same time the owners of the Lady of the Lake mining claim, as part of the same agreement, made and delivered to the applicants for patent for the Clara mining claim, and also filed in said United States Land Office a written withdrawal relinquishing their said protest and adverse claim against the application for patent for the Clara mining claim, and released to the United States and their grantees the lands and premises in conflict between the said Clara and the Lady of the Lake mining claims, the said conflict area containing forty one hundredths of an acre, more or less."

A copy of the mineral laws of the Blue Ledge mining district was by agreement filed with the stipulation, and it was agreed they formed a part of the application for patent for the Clara mining claim. The defendant reserved the right to object to the admissibility of any facts offered with a view to attack or impeach the validity of the patent.

The case was submitted to the court on the pleadings, stipulations and exhibits of the parties. The court rendered judgment in favor of the defendant as the owner of the premises in

dispute, and entitled to the possession thereof, and dismissed the plaintiff's action on the merits. This judgment, on appeal to the Supreme Court of Utah, was affirmed. We think it clear that the appellant has no title, color of title, or right of any kind to the area in conflict between the Lady of the Lake mining claim and the Clara mining claim. The facts show that whilst the application for patent for the Clara mining claim was pending, and during the sixty days' period of publication of notice, the owners of the Lady of the Lake claim (grantors of the appellant), filed their protest and adverse claim against the same, but afterwards, and within the sixty days, filed in the local land office a relinquishment of such adverse claim, and a withdrawal of the protest against the said application for the Clara mining claim.

As to the disputed premises within the Central mining claim, the defendant relies upon his patent, which is admitted to include the land in controversy, and was free from any conflict with the Central mining claim at the date of its issue. He claims this patent to be conclusive of the legal title, and that it justifies the presumption that all the prerequisite facts and acts prescribed by law were complied with. The appellant contends that the patent is void, because it was issued in violation of the mining laws of the Blue Ledge mining district in which the location was made, in that those mining laws, which have the force of a public statute, fixed the width of mining locations within that district at 200 feet. The patent was for a location of 600 feet.

The first issue to be determined is, whether the complaint is sufficient to authorize the admission of evidence impeaching the validity of a patent, or to sustain a judgment annulling it. This question was directly presented in the case of *Ely* v. *New Mexico and Arizona R. Co.*, recently decided by this court. 129 U. S., 291. That was an action commenced in a territorial court under the statutes of that territory, almost literally the same as the statutes of Utah under which this action

arose, and the prayer for relief was precisely the same in both complaints. The court held, in that case, that the rule enforced in the Circuit and District Courts of the United States, that a bill in equity to quiet title or remove clouds must show a legal and equitable title in the plaintiff, and set forth the facts and circumstances on which he relies for relief, does not apply to an action in the territorial court founded upon territorial statutes, which unite legal and equitable remedies in one form of action. The complaint in the present case, in compliance with the requirements of the Practice Act of Utah Territory, states in concise language the two ultimate facts, upon which the claim for relief depends, that the plaintiff is in possession of the property, and that the defendant claims an interest or an estate therein adverse to him. These are sufficient to require the nature and character of the adverse claim on the part of the defendant to be set up, inquired into, and judicially determined, and the question of title finally settled.

The only question, therefore, which remains for consideration, is, whether the proofs in the agreed statement of facts, which are incorporated in the findings of fact, show that the patent should have embraced a width of only 200 feet. By § 2319, Rev. Stat., mineral lands are open to purchase under regulations prescribed by law, and according to the local custom and rules of miners in the several mining districts, not inconsistent with the laws of the United States. Counsel for appellant cites the rules adopted in the Blue Ledge mining district, May 17, 1870, to sustain his position. One of these rules, § 4, provides that "the surface width of any mining location shall not exceed 100 feet in width on each side of the wallrocks of said lode." Had that regulation remained in existence and been in operation at the time the Clara mining claim was located, its effect upon the legality and validity of that location, at least as to all the land in excess of 200 feet, could not be doubted; but we find that the miners of

Blue Ledge mining district frequently changed their rules in several important particulars, among them those relating to the width of mining locations. We find in the record the "minutes of a miners' meeting, held on May 4, 1872, to alter and amend the laws of the Blue Ledge mining district." It is an agreed fact that, on the day of that meeting, it was known to those miners that an act of Congress, relating to the location and extent of mining claims upon mineral lands of the United States, had passed, or was about to be passed. Among the other alterations adopted at that meeting, and, as seems to be agreed, in anticipation of the act of Congress, they provided in § 14 that "the surface width shall be governed by laws of the United States of America." And in § 19 they add the general repealing clause. The act of congress, which was passed May 10, 1872, provides as follows:

"A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode. . . . No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary." Rev. Stat., § 2320.

The Clara mining claim, it is conceded, was located under the by-law and the act of Congress just quoted. It was located, officially surveyed for application for patent, and formally presented to the Land Office for patent, before the Central mine was located. It is admitted that these by-laws were before the Commissioner of the General Land Office and formed a part of the application. The question as to which of these provisions was in force, was one of fact, determinable by the commissioner, whose duty it was also to take official notice

of the statute upon the subject. He decided as a fact, that the local laws of the district as to the width of the location had not been exceeded in this instance.

Whether this decision of the Commissioner as to a fact within his jurisdiction goes to the full extent claimed, we need not decide. In every view, we think it was correct, and that the patent issued by him was according to law, and, therefore valid.

The judgment of the court below is

Affirmed.

LINCOLN WHITE ET AL. v. GEORGE LEE ET AL.

(78 California 593; 21 Pac. 363; 12 Am. St. R. 115. Supreme Court. April 18, 1889.)

[1]**Legal sub-divisions must be staked.** Defendant's grantor posted notice locating a certain governmental sub-division; the S. W. ¼ of the N. W. ¼ of Sec. 22 etc. He did not renew nor seek for the government stakes: *Held*, that the claim was not marked on the ground as required by the Act, and that such act applied to locations of legal sub-divisions of surveyed lands.

Appeal from a judgment of the Superior Court of Placer County, and from an order refusing a new trial.

In this case the locator did not attempt to mark the boundaries of his attempted claim upon the ground. He simply posted his notice of location. The description in the notice was as follows: "All of the S. W. ¼ of the N. W. ¼ of Sec. 22, Town. 11 N., Range 7 E., Mount Diablo base and meridian, situated in Pine Grove Mining District, Placer County, California." There was no reference in the notice to the marks of the public surveys, nothing which could be construed as an adoption of any marks placed by the public surveyors, further than the reference to the quarter-section as above stated. It did not appear how distinctly the section corners had been marked in the first instance, or whether such marks existed at the time of the location in question. The locator testified that "he did not then, and does not now, know where the

[1]The text case and *Anthony* v. *Jillson*, 16 M. R. 26, are the only adjudicated cases which we find directly bearing on the question whether legal sub-divisions must be staked when taken up as placer claims. None of the citations printed in the text bear squarely on the point. *Sweet* v. *Webber*, 7 Colo. 443, supports it in its general ruling that placer claims come generally under the provisions relating to Lode claims. The Land Office practice does not require the corners to be marked. *Reins* v. *Murray*, 22 L. D. 409. But the text case is quoted and approved in Lindley § 454 and in Snyder on Mines § 388.

boundaries of said S. W. ¼ of the N. W. ¼ are, except that he knows that it is bounded on the S. by the Hoadly placer mine." The further facts are stated in the opinion.

HALE & CRAIG, and WILLIAM SINGER, Jr., for the appellants, contended that it was necessary that the boundaries should have been marked, and cited *Holland* v. *Mt. Auburn Co.* 53 Cal. 149; *Gelcich* v. *Moriarity*, 53 Cal. 217; *Funk* v. *Sterrett*, 59 Cal. 613; *Newbill* v. *Thurston*, 65 Cal. 419; *Du Prat* v. *James*, 65 Cal. 555; *Horswell* v. *Ruiz*, 67 Cal. 111; *Anderson* v. *Black*, 70 Cal. 226; *Gregory* v. *Pershbaker*, 73 Cal. 109.

F. P. TUTTLE, for the respondents, argued that section 2324 of the U. S. Rev. St., which required that the location should be distinctly marked upon the ground, was to be read in connection with sections 2329, 2330 and 2331; and that when so read, it was clear that it did not require the marking of the boundaries of a placer mining claim upon surveyed land; that the object of requiring the boundaries to be marked was to enable them to be readily ascertained, and that the reference to the number of the section and the designation of the particular quarter of that section which was sought to be located enabled the boundaries to be readily ascertained, and that this was all that was required. He further argued that all the cases cited for the appellants, with possibly two exceptions, were cases of quartz or lode claims, and that a different rule applied to placer claims; and that the portion of the opinion in *Gregory* v. *Pershbaker*, relied on for the appellants, was a mere *dictum*.

HAYNE, C. Action to determine the right to a mining claim. Judgment for defendants. Plaintiffs appeal.

In 1886 the grantors of the plaintiffs located the land, marked off the boundaries, and did all the other acts required

of them by law, and therefore they acquired a valid claim if there was no prior right in the grantors of the defendants. The latter posted and recorded notice of location, but failed to mark off the boundaries. The statute requires that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced." Rev. St. § 2324. And it is well settled that a failure to comply with this requirement invalidates the claim. It is contended for the respondents, however, that the requirement does not apply where the public surveys have been extended over the land, and the claim is for the whole of a legal subdivision; and this is the only question to be determined. The learned counsel for the respondents expressly says: "The one point to be passed upon by the court in this case is whether in locating a placer mining claim by legal subdivisions on surveyed ground it is necessary to mark the lines of the location." The position is that this exception to the general requirement follows from other provisions of the Revised Statutes. But we do not think that this position can be maintained.

Section 2329 provides, among other things, that "where the lands have been previously surveyed by the United States the entry in its exterior limits shall conform to the legal subdivision of the public lands."

This, however, simply provides where the claimant shall run the lines of his claim. It does not at all dispense with the requirement as to how the lines shall be marked or evidenced.

Section 2331 provides that "where placer claims are upon surveyed lands, and conform to legal sub-divisions, no further survey or plat shall be required," etc. This provision does not refer to the marking by the claimant of the boundaries of his claim upon the ground, but to the plat and survey which are to be filed upon the application for the patent. Nor do we see any provision which dispenses with the general requirement that the boundaries shall be marked.

The construction contended for does not seem to us to be in harmony with the general purpose of the act. The purpose of the requirement that the claimant shall mark the boundaries of his claim is to inform other miners as to what portion of the ground is already occupied. The men for whose information the boundaries are required to be marked wander over the mountains with a very small outfit. They do not take surveyors with them to ascertain where the section lines run, and ordinarily it would do them no good to be informed that a quarter section of a particular number had been taken up. They would derive no more information from it than they would from a description by metes and bounds, such as would be sufficient in a deed. For the information of these men, it is required that the boundaries shall be "distinctly marked upon the ground." The section lines may not have been "distinctly" marked upon the ground, or the marks may have become obliterated by time or accident. And to say that the mere reference to the legal sub-division is of itself sufficient would, in our opinion, defeat the purpose of the requirement.

We therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are *reversed, and the cause remanded for a new trial.*

JOHN SYNNOTT ET AL. v. MICHAEL SHAUGHNESSY.

(130 U. S. 572. Supreme Court. April 22, 1889.)

[1]**Concealing discovery of float ore.** Plaintiff sold to defendant a Lode claim on which he had developed a small vein; defendant bought not for the value of the discovered vein, but upon the hope of finding within the lines of the claim a better vein, float from which had been shown to him. Following up this float shortly after the purchase, he discovered the large and valuable vein from which it came: *Held*, that the knowledge of float was not knowledge of the vein, and that the allegations of fraud and concealment were wholly unsupported.

Payment by vendees of a commission to vendors agent, held under the facts of the case, no fraud.

Appeal from the Supreme Court of the Territory of Idaho.

J. G. SUTHERLAND and J. R. MCBRIDE, for appellants.

No appearance for appellee.

LAMAR, J. On the 24th of May, 1882, John Synnott and Peter Welch commenced an action in one of the territorial courts of Idaho Territory against Michael Shaughnessy, to have annulled the sale of the Eureka Silver Mine, situated in Mineral Hill mining district, Alturas county, in that territory, and to compel him to reconvey the same to them as vendors. In their complaint the plaintiffs alleged that on the 5th day of July, 1881, they were the owners each of an undivided one-half, and in the lawful possession, of the Eureka silver mining claim, particularly describing it by metes and bounds, which they had located in June, 1880, and upon which they had developed a small seam or vein of galena ore, worth about $1,000; that this vein was all of the ore which had been discovered by them, or either of them, upon the mining claim up to that time, and that they were ignorant of the existence of any other vein or body of ore, and believed

[1]*Neill* v. *Shamburg*, 158 Pa. 263; 27 Atl. 992.
Jennings v. *Rickard*, 15 M. R. 624.

that all the value that was then attached to the mining claim arose from the developments they had made upon the claim, and the ore they had discovered, and did not exceed $2,500; that on or about the 3rd of July, 1881, the defendant, by his agents or employés, had discovered upon a part of the Eureka mining claim, remote from the places where the plaintiffs had been at work, a large and valuable vein or body of ore, from 18 inches to 4 feet in thickness, extending about 70 feet continuously along said vein, the existence of which rendered the mine worth at least $100,000, and of the existence of which these plaintiffs were wholly ignorant; that the defendant, by his agents and servants, intending to cheat and defraud these plaintiffs, fraudulently and falsely concealed and suppressed from them the knowledge of the existence of such vein or ore body, and misrepresented the facts concerning the same, and fraudulently and falsely represented to them that no other ore body or vein of ore existed in the mining claim, except such as was known to these plaintiffs; that such false and fraudulent statements were made by the defendant, his agent, and employés, in order to enable him to purchase the mining claim at a price far below its real value; that by means of such false and fraudulent concealment and misrepresentations these plaintiffs, who believed the same to be true, were made to believe that no other body or vein of ore existed in the mining claim than that which was known to them, and that the real value of the claim was not more than $2,200; that immediately prior to the discovery of the ore vein or ore body by the defendant, these plaintiffs had employed one Henry Porter as an agent to find for them a purchaser of their claim at the sum of $2,500, and agreed to pay him 10 per cent. of that sum if he should make a sale thereof at the price mentioned; that during such employment of Porter, and while he was endeavoring to obtain a purchaser for the mine, he himself first made the discovery of the aforesaid ore vein and ore body, which was unknown to these plaintiffs;

that upon such discovery Porter concealed the same from the plaintiffs, and falsely and collusively and for a consideration paid to him by the defendant, to-wit, $1,000, informed the defendant of the existence of such large vein or ore body, and then and there, in violation of his employment by these plaintiffs, and in fraud of their rights, entered into the employment of the defendant, and undertook and agreed to assist him in concealing from them the knowledge of the existence of the ore body he had discovered, and in obtaining the mining claim from them, at the price of $2,200, which was greatly below its real value; that by reason of those false, fraudulent, and collusive acts of Porter, as well as the misrepresentations and concealments of the defendant, these plaintiffs were induced to part with their property for the sum of $2,200, and to execute and deliver to the defendant a quit-claim deed of the Eureka mining claim, dated on the 5th day of July, 1881, which was afterwards duly recorded; that by reason of such conveyance thus fraudulently obtained from them, and if the same be not declared fraudulent, null and void, they will sustain great pecuniary loss and damage, to-wit, $100,000; that since the conveyance to the defendant of the mining claim he has been in the possession of the same, and has extracted and taken therefrom a large quantity of ore, and has made large profits therefrom, to-wit, over $3,000; and that the plaintiffs are ready and willing and hereby offer to repay to the defendant the sum of $2,200, the purchase price of the mining claim, together with interest from July 5, 1881, upon a reconveyance of the mining property to them.

The prayer for relief was (1) that the deed of July 5, 1881, be declared fraudulent, null, and void, and set aside by the court, and the defendant be decreed to reconvey the mining claim and premises to the plaintiffs upon their paying him the purchase price thereof, together with lawful interest from the date of the purchase; (2) that the defendant be decreed to account to the plaintiffs for the net proceeds of the ore extracted by him from the mining claim since his purchase

thereof, and upon such accounting be decreed to pay the same to the plaintiffs; (3) that the defendant, his agents and employés, be enjoined and restrained from interfering with the mining claim, or extracting or clearing away any of the ore therefrom; (4) that the plaintiffs be put in possession of the mining claim by the process of the court; (5) that the defendant be decreed to pay the costs of this action; and (6) for other and further relief. The answer of the defendant denied specifically all the material allegations of the complaint, and set out in detail the circumstances attending the purchase of the mine, which, if proved, would establish his good faith in such purchase, and the absence of any fraudulent acts on the part of himself or any of his agents connected with such transactions. The cause having been heard upon the pleadings and proofs, the court found the facts in favor of the defendant, and entered a decree in his favor. Upon appeal to the Supreme Court of the territory, that decree was in all respects affirmed (7 Pac. Rep. 82); and an appeal from the latter decree brings the case here.

The findings of fact by the trial court, and which were adopted by the Supreme Court of the territory, are 20 in number, and elaborately set out all the facts and circumstances attending the sale of the mine. The material facts, as gathered from these findings, stated briefly, are as follows: For some time prior to the 5th of July, 1881, the plaintiffs, Synnott and Welch, had owned the Eureka mine, and had lived in a cabin near by. They had done considerable work in developing it, and had found a small vein of ore, from which they had extracted, through several tunnels, about $1,000 worth of ore, then lying on the premises. They were desirous of selling the claim, and entered into an agreement with one Porter, to pay him a commission of 10 per cent. on the sale thereof, in case he realized from such sale $2,500. Under these arrangements Porter first applied to one John Gilman to purchase the claim, but no agreement was reached between them. Porter then, on the morning of July 5, 1881, tried to induce one

E. A. Wall, (who afterwards acted as the agent of the defendant Shaughnessy) to purchase the claim. He informed Wall that he had a verbal option of purchase at the price of $2,000, and that his terms would be a commission of $500, or one-fourth of the claim, if Wall should purchase it. In the same interview he stated to Wall that he thought he could show him something on the claim that would induce him to buy it. Porter then having disclosed to Wall that he had a further appointment with Gilman to resume negotiations regarding the claim, Wall declined to have any further conference, or to make any terms for the purchase, so long as negotiations with Gilman continued. Porter then met Gilman, and they inspected the claim together. Porter showed him float ore which he had discovered at two places on the claim, one of which was on and about the path which Synnott and Welch had usually traveled from their cabin to their work on the claim, and the other at a point about 50 yards from that path. After this inspection Gilman went immediately to Synnott and Welch, and had further negotiations with them, but they failed to agree on any terms. Synnott and Welch then informed Porter that they were willing to sell the claim for $2,000, but in that case could not allow him any commission. On the evening of that day Porter again went to Wall, and resumed negotiations. They went together over the Eureka claim, and Porter showed Wall the float ore he had found, and insisted on having one-fourth of the claim for his option, and for showing the float ore. Wall informed him that if he bought the claim it would be for the defendant, Shaughnessy, who might prefer to be the sole owner, and proposed that if Porter would allow him ten days to decide he would either allow him one-fourth of the claim or pay him $1,000, to which Porter agreed, and at the end of that period, and after the purchase, the $1,000 was paid to Porter accordingly. After their examination of the claim, Wall went with Porter to the cabin of Synnott and Welch, and informed them

that he would buy the claim for $2,000, to which they assented. Wall then told them to come down to his office at Bullion and make out their deed, and they agreed to do so. After Wall and Porter had left, Gilman returned and resumed negotiations with Synnott and Welch, finally offering them $1,800 and one tenth of the proceeds of the claim, or $2,200 in money for the whole. He also informed them of the fact that Porter had discovered float ore on the place. After Gilman had gone away, Porter returned to the cabin of Synnott and Welch, and the three went together to Wall's office. On the way they informed Porter of the offer made by Gilman, and intimated that they would expect the same from Wall, because they were poor, and could not afford to lose the $200, or pay any commission. On their arrival at Wall's office, Porter informed Wall of Gilman's offer, whereupon Wall told them that he would pay $2,200 for the claim, adding, with some asperity, that Gilman should not have it at any price. The deed from Synnott and Welch to Shaughnessy for $2,200 was then drawn and executed and attested, and was acknowledged the following day. The day after the sale, Porter did some work on the claim at one of the points where he had found float ore, and on the following day Wall, as agent of the defendant, put miners at work at one of the places where float ore had been observed, and in the course of a few days, by an open cut 20 by 25 feet, discovered a body of ore in place which, when taken out, weighed 23 tons, and netted the defendant about $800. The ore exposed by Synnott and Welch was taken out and sold by the defendant, netting him about $90. The defendant afterwards expended about $23,000 in developing the claim, and discovered a large and valuable lode. He has sold ore from it to the amount of about $3,000. At the time this suit was brought he had opened negotiations for the sale of the claim at $150,000.

The plaintiffs in error rest their case upon two propositions, viz. (1) The defendant, with knowledge of the existence of

a large "body of ore" in this claim, by his agent, who made the purchase, willfully misled the plaintiffs in relation thereto, and induced them to sell for a price which they would not have sold for had they been truly informed of the facts. (2) The defendant, by his agent, (Wall), entered into an agreement to pay the agent of the plaintiffs (Porter) a sum of money to conceal from his principals his knowledge of the existence of a valuable body of ore, which he had informed the defendant's agent of, and then procured a conveyance from the plaintiffs of the claim in fraud of their rights. These two propositions, in our opinion, are clearly negatived by the twelfth, fourteenth and fifteenth findings of fact, which are as follows: "(12) The evidence in the case does not show or tend to show that Wall or Porter or any other person had discovered or knew of the existence of any vein or lode of ore in place on the Eureka mining claim, other than such as had been found by and was known to Synnott and Welch, in their excavations, at any time prior to the sale and execution of the deed." "(14) No false or fraudulent representations concerning the Eureka mining claim were ever made to said vendors or any one else by the defendant, or by any agent or employé of his." "(15) No concealment of any material fact concerning said mining claim was ever made by the defendant, or by any agent or employé of his. Neither the defendant nor any agent of his had ever discovered or knew of the existence of any vein or lode on said claim (except such as Synnott and Welch had exposed by their tunnels) prior to the sale, nor until some days had elapsed after the sale." In the assignment of errors, however, it is insisted that these findings are not responsive to the allegations of the complaint. It is said that the trial court did not make any findings on the following material issues: (1) It did not find as to the value of the ore body discovered in the Eureka mining claim by Porter, and by him shown to Wall at the time the purchase was made by the latter for the defendant. (2) It did not

find as to the knowledge of the existence and extent of such ore body by Wall at the date last mentioned. (3) It failed to find whether Porter discovered any ore body, as alleged, and, if so, when, and what was its value and extent; what concealments were practiced by him upon the plaintiffs, if any; what knowledge defendant or his agent had of these concealments; whether plaintiffs were offered or received the value of the claim at the time of the sale thereof; what the defendant paid Porter the $1,000 for; what the contract was between Porter and Wall; and what were Porter's relations to the vendors at the time of the sale. We do not think there is much force in this contention. It will be observed that the basis of this assignment of error is the assumption that Porter, as the agent of the plaintiffs, prior to the day the mine was sold, had discovered a valuable body of ore, the knowledge of which he concealed from the plaintiffs, and imparted to the defendant. This assumption, as shown by the findings, to which we are restricted, is entirely without foundation. Neither Porter, nor the defendant nor his agent, Wall, ever discovered any vein or lode of ore on the claim at any time prior to the sale thereof by the plaintiffs. The counsel for appellants contend that the court, in finding that Porter or Wall discovered no "vein" or "lode," did not find that they discovered no "ore body." We deem it sufficient to say that the context of the complaint shows that those terms were used synonymously by the pleader, in the common parlance of miners, and not with reference to any technical distinction. The only indications of any such ore body or vein that had been found were simply a few small pieces of ore known as "float" ore, which did not of necessity indicate the existence of any large ore body. Further, the fact that Porter had found "float" ore on the claim was made known to the plaintiffs before they made the deed for the claim. Such purely surface indications, open to all ordinary observers, and situated on or near the path along which the plaintiffs traveled

in going to and from their work, must have been known to them, and are not such as to be made the subject of concealment and misrepresentation. The fact, however, that there was no such discovery of an actual vein or body of ore demonstrates that there could have been no such fraudulent and collusive concealment and misrepresentation, as to its limit and extent, as is charged in this complaint. It required not only a considerable excavation, but also a great outlay of money and great labor on the part of the defendant to develop the existence of a vein of ore.

This virtually disposes of both propositions advanced by the plaintiffs in support of their contention. That the defendant paid Porter $1,000, there is no question. But that such sum was paid him to conceal from the plaintiffs his knowledge of the existence of a large ore body on the claim could not have been true; for the findings state that he possessed no such knowledge. It is presumable that the plaintiffs, as men of ordinary intelligence, must have known that Porter was to receive from the defendant, or his agent, Wall, a commission for his work in the transactions connected with the sale of the mine; for the findings show that they did not pay him anything out of the sum received from such sale, as their agent, and informed him beforehand that, while they were willing to sell the claim for $2,000, in that case they could not allow him any commission. It really could make no difference to the plaintiffs what he was paid, since they received for the claim all they had asked for it, and in reality $200 more than they had, a few hours before, agreed to take, and within $50 of what they would have got if Porter had made the sale under their first agreement with him. There are no other features of the case that call for special mention. In no aspect of it do we think either the law or the equities are with the plaintiffs.

The judgment of the Supreme Court of Idaho is therefore

Affirmed.

J. M. MILLER ET AL. v. G. W. BUTTERFIELD.

(79 California 62; 21 Pac. 543. Supreme Court. April 24, 1889.)

[1]**Time against Board. Failure to Board.** Where an outfitter agrees to board a party while prospecting as consideration for an interest in any mines the prospector may find or buy—and the outfitter becomes insolvent and so unable to and does not keep his contract to furnish board, he is not entitled to any share in the discoveries.

Such an agreement as to mines bought necessarily implies that the outfitter should pay or tender his half of the price paid for such purchases.

A written prospecting contract cannot be varied by parol; and a subsequent verbal arrangement as to the management or disposal of the properties to be acquired is immaterial.

Appeal from a judgment of the Superior Court of Mono County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

P. REDDY, (MCALLISTER & BERGIN, of counsel,) for appellant.

ROBERT M. CLARK, KITTRELL & OWEN, and T. W. W. DAVIES, for respondents.

BEATTY, C. J. September 24, 1879, the parties to this action entered into the following agreement in writing:

"We, the undersigned, agree to share equal in any mine that we may buy or find from this date. I, G. W. Butterfield, offset my time against my board with O. Miller and J. M. Miller. G. W. BUTTERFIELD, J. M. MILLER, ORRIN MILLER."

At the time of the execution of this agreement plaintiffs were keeping a hotel in Bodie, a mining town, and defendant

[1]*Murley* v. *Ennis*, 12 M. R. 360; *McLaughlin* v. *Thompson*, 2 Colo. App. 135; 29 Pac. 816.

was a miner and prospector. The plaintiffs were in financial difficulties, and in less than three weeks their hotel was closed, and their business broken up, by the action of their creditors. They did not and could not thereafter board the defendant, and no mines had been discovered or located up to the time their hotel was closed.

Meantime, however, defendant had commenced negotiations for the purchase of the mining properties, or some of them, which are in controversy here, and he did subsequently effect purchases with money procured upon his own individual credit, and advanced by him alone. The plaintiffs did not and could not contribute, and never offered to contribute anything towards the fund with which these interests were purchased. The conveyances were made to the defendant, and he claimed to be the sole owner. The plaintiffs thereupon commenced this action, alleging the formation of a partnership between them and defendant on the 24th of September, 1879, to locate, buy, and sell mines on joint account, and praying dissolution, accounting, and conveyance to them of their interest in the mines acquired by defendant in his own name subsequent to the date mentioned.

The findings and decree of the Superior Court were in favor of plaintiffs, from which, and from an order denying his motion for a new trial, defendant appeals. On the trial in the Superior Court plaintiffs introduced in evidence the written agreement above quoted, and also, against the objection of defendant, parol testimony, not only as to the circumstances surrounding the parties at the time of the execution of the written agreement, but also as to what the parties understood or intended it to mean, and as to the subsequent conversations between the parties to the effect that they would sell and share the proceeds of the mines acquired in pursuance of the agreement.

Whether the finding of the Superior Court that there was a partnership was based upon a construction of the writing,

read in the light of the circumstances surrounding the parties at the time of its execution, or upon the parol testimony as to the real meaning of the parties, and their subsequent talk about selling the mines, does not clearly appear, but we think that in any view the finding was erroneous.

The true construction of the contract appears to be this: that the Millers were to board Butterfield while he employed his time prospecting, and that as to any mines discovered and located by him (found) pending the agreement, and while it was performed by them, all were to be tenants in common with equal shares. As to mines bought, the parties were also to be tenants in common, with the like interest, but this only upon the condition (necessarily implied) that they should contribute equally to the purchase fund. Neither was obliged by the agreement to contribute to the purchase of any particular mine, selected by one or both of the others, though each may have been entitled to the opportunity to so contribute, and to share in the purchase. Certainly they could not, one or more of them, allow another to make a purchase with his own funds, and at his own risk, and, without being obliged to reimburse him in case of loss, claim the advantages of the bargain in case of gain.

This being the proper construction of the written contract, parol evidence was inadmissible for the purpose of enlarging, extending, or otherwise varying it; and any subsequent contract with respect to the management or disposal of the property to be acquired, whether in writing or by parol, was wholly immaterial. Conceding, without deciding, that a subsequent parol contract to sell the property acquired in pursuance of the written contract, and to divide the proceeds in stipulated proportions, might have bound the parties, the question, and the only material question in this case, still remains, what property was so acquired? We think that the fact that the defendant alone provided the funds for the purchase of the properties in controversy; that the plaintiffs not only did not,

but could not, and were in no wise bound to, contribute any share in the purchase money, is fatal to their claim to an interest in such properties.

Ordered, therefore, that the judgment and order appealed from be

Reversed, and cause remanded.

We concur: WORKS, J.; PATERSON, J.; MCFARLAND, J.; THORNTON, J.; SHARPSTEIN, J.

PITTSBURG MINING CO. v. SPOONER ET AL.

(74 Wisconsin 307; 42 N. W. 259; 17 Am. St. Rep. 149. Supreme Court, April 25, 1889.)

[1]**Promoters of a corporation who on its formation become officers** thereof must be treated as its agents and trustees, and held accountable to it for any profits which they realize upon property bought for and sold to the corporation.

Imposition by promoters on stockholders. If promoters of a corporation have obtained an option for the purchase of property at a certain price, and have proceeded to form a corporation, representing to persons whom they induced to subscribe for its stock that such option would cost a larger price than they have agreed to pay, and if, after procuring such subscription, they purchase the property at the smaller price and charge the corporation the higher, it may sustain an action against them, and recover the difference between the two prices.

Action by the company against its promoters. Corporation may maintain an action against its promoters to recover profits realized by them from the sale of property to the corporation at a sum which they represented to be the cost price, but which was in fact in excess of such price.

Illegality, when no Defense. Agents receiving moneys upon illegal sale of stock of a corporation cannot set up the illegality of the transaction as a defense to an action by the corporation to compel them to account therefor.

Promoters and organizers estopped. Persons who have been instrumental in the formation of a corporation and in issuing alleged stock, and who have contracted with the corporation with full knowledge of all its transactions, are not in a position to contest the regularity of its formation.

Appeal from the Circuit Court for Dane County.

Action by the Pittsburg Mining Company to recover seventy thousand dollars had and received by the defendants for

[1]*Hersey* v. *Tully*, 8 Colo. App. 110; 44 Pac. 854.

Holding as to non-identity of original company and of leasing company composed of its stockholders. *United Co.* v. *Hatcher*, 79 Fed. 517.

Promoters are not entitled to compensation. *Ritchie* v. *McMullen*, 79 Fed. 522.

Contract between organizers to divide stock, held void. Exchange of stock for land and services, held under the facts, without consideration. *Garrett* v. *Kansas City Co.* 113 Mo. 330; 20 S. W. 965.

Deed to a Corporation about to be formed passes title to the Corporation when in fact formed. *Santaquin Co.* v. *High Roller Co.* (Utah) 71 Pac. 77.

the use of the company. The complaint alleged that the defendants conceived the idea and agreed together to promote the organization of the plaintiff for the ostensible purpose of mining iron, but for the real purpose of cheating those who might deal with the corporation, and enriching themselves; that in pursuance of the scheme the defendants obtained an option to purchase certain mining claims for the sum of twenty thousand dollars; that the defendants then proceeded to obtain subscriptions to the capital stock, falsely and fraudulently representing to divers persons, and to all persons who became and are now stockholders, that the price demanded for said option was ninety thousand dollars, and that it could not be bought for less, and that it would be necessary, for the purpose of operating the business, to raise the sum of one hundred thousand dollars, of which ninety thousand dollars should be used for purchasing such option and the balance to be put in the treasury of the company to develop the mines; and that, in furtherance of their fraudulent scheme, the defendants drew up and procured to be signed a subscription paper, of which the following is a copy:

"The undersigned hereby agree with A. H. Main, of the City of Madison, Dane County, Wisconsin, the owner of a mining option upon, in, and to all of the north half of the southwest quarter of Section No. 11, Town 47, Range 45 east, of the

Deed to company before its organization; grantors estopped to deny its existence. *Reinhard* v. *Virginia Co.* 107 Mo. 616; 18 S. W. 17.

Contract made for a corporation to be formed, does not bind it. *Winters* v. *Hub M. Co.* 57 Fed. 287. *Hecla Co.* v. *O'Neill*, 19 N. Y. Sup. 592.

Formation of new company with transfer of assets on consideration of alleged past indebtedness, held only a reorganization and the new company liable on the old company's obligations. *Higgins* v. *California Co.* 122 Cal. 373; 55 Pac. 155.

Corporation changing its name may be sued by the former name. *Welfley* v. *Shenandoah Co.* 83 Va. 768; 3 S. E. 376.

New company when not a successor to old one. *Carey* v. *Des Moines Co.* 81 Ia. 674; 47 N. W. 882.

Michigan meridian, situate, lying, and being in the County of Ontonagon, State of Michigan, and with each other, that they will take of and from the said A. H. Main the number of shares of non-assessable, paid-up stock in the Pittsburg Mining Company, proposed to be formed, set opposite their respective names, and pay for the same the sum of $2.50 per share, said payment to be made as soon as the company is duly incorporated under and by virtue of either the laws of the State of Michigan or Wisconsin, and the said A. H. Main shall assign and transfer over to said corporation, and give and convey to said corporation, a perfect title to the same said option. It is understood that the capital stock of said corporation shall be one million dollars, in forty thousand shares of twenty-five dollars each. It is also understood and agreed that a shaft has been sunk, upon the land covered by said option, to a depth of about seventy feet, and that there is in sight, at such depth below the surface of the land so covered by said option, ten thousand tons of iron ore."

That the subscription paper was signed by a large number of persons agreeing to take shares in a sufficient amount in the aggregate to cover the entire proposed stock of the projected corporation, to-wit, one million dollars; that as soon as the stock was subscribed, to-wit, March 21, 1887, the defendants organized the plaintiff corporation and were its only original incorporators; that at a meeting of the corporation of March 22 of the same year all the defendants were present, the defendant Spooner was elected president, and the defendant Main treasurer, and the defendant Main, with the advice and procurement of the other defendants, and in their joint interests, subscribed for the entire stock of the corporation except one share each, taken by the defendants Spooner and Oakley, and the meeting, by the unanimous vote of the defendants and sole corporators and directors adopted the following resolutions:

"Resolved, that, in accordance with the subscription of A. H. Main to the capital stock of said company, the president and secretary hereof issue to him, or to such person or persons as he may direct, and in such number of shares as he may direct, all of the said stock, except two shares thereof, one of which is held by said Phillip L. Spooner, Jr., and the other by said F. W. Oakley, the said stock to the said Main to be issued as paid up in full, in consideration of his making and delivering to the president of the said corporation, for the said corporation, an assignment in writing, duly executed, of an option which he now owns on the north half of the south west quarter of section eleven (11), township forty-seven (47), range forty-five (45) east, Ontonagon County, Michigan."

That none of the stock subscribed for by the defendant Main was ever issued to him except twenty-five thousand dollars; that although he conveyed to the corporation the mining option in nominal payment for all the stock of the corporation, neither he nor any of the defendants ever had any interest in the said option above the price of twenty thousand dollars; that the defendants, in furtherance of their fraudulent scheme, caused the option to be conveyed to said Main without consideration; caused the corporation to buy it from him for substantially its entire capital stock; caused the agreement to take shares in the projected company to be read as an agreement to take them of said Main instead of the company, and then issued the shares so subscribed for to the several persons, who, by the agreement aforesaid, had agreed to take them and collect from them the sum of one hundred thousand dollars, out of which was paid twenty thousand dollars for the option, ten thousand dollars into the treasury of the company, and the remaining seventy thousand dollars was converted by defendants to their own use.

The complaint was demurred to upon the ground that plaintiffs did not have legal capacity to sue, and that it did not state

facts sufficient for a good cause of action. The demurrer having been sustained, the plaintiff appealed.

TENNEY, BASHFORD and TENNEY and JOHN M. OLIN, for the appellant.

H. W. CHYNOWETH, and GREGORY, BIRD and GREGORY, for the respondents.

TAYLOR, J. Upon the hearing of the appeal in this court, no contention was made by the learned counsel for the respondents that the demurrer was properly sustained upon the first alleged ground, viz., that "the plaintiff has not legal capacity to sue." The only question argued at length was whether the complaint stated facts sufficient to constitute a cause of action. The learned counsel for the appellant corporation contends that the complaint states facts constituting a cause of action—*First*, upon the ground of actual fraud committed by the defendants upon the company by the sale of the mining option to the company for a sum greatly in excess of its real value, brought about by false representations as to its actual cost; and, *second*, that it states a cause of action against the defendants as the promoters of the corporation, and, as such, holding a relation of trust and confidence towards it; and that, acting as the agents and officers of the corporation, they sold to the corporation, and bought for the corporation, the mining option for the sum of $70,000 more than its actual value and more than they paid for the same; that this was done without the knowledge and consent of the real stockholders of the corporation, and in fraud of their rights, and upon that ground they are liable to the corporation for the profits made by them on such sale to the corporation. The last alleged cause of action is the one upon which the learned counsel for the appellant mainly relies in this court, and is the one in favor of which the main argument of the learned counsel for the appellant is made.

Considering the defendants as the officers and promoters of the corporation at the time of the alleged purchase and sale complained of, it seems to me very clear that—laying out of view the fact that the money of the stockholders paid for their stock to the corporation, and which money was paid to defendants for the mining option, was obtained by the issuing of full-paid shares to the stockholders upon the payment of 10 per cent. of their par value, in violation of the statute—there can hardly be room for a contention that, upon the facts stated in the complaint, a cause of action is not stated against the defendants. Under the allegations of the complaint we must treat the alleged sale of the mining option to the defendant Main for the entire stock of the corporation, viz., $1,000,000, as a mere subterfuge and device to cover up the real transaction, which is substantially as follows: The defendants, having obtained a right to purchase the mining options mentioned in the complaint for $20,000, proceeded to form a corporation to make such purchase, representing to the persons who subscribed for the stock that it would cost $90,000 to make such purchase, and, having first induced other persons to subscribe for the stock upon such representations, and to pay to the corporation upon or for their stock $100,000, the corporation then, through its officers, the defendants themselves, purchased the option for $90,000, paying the $20,000 which it cost them with the money received by the corporation, and converting the $70,000 to their own use. This is the substance of what is alleged to have been done by the company, and it appears to me to be immaterial as to the manner of doing it. It being shown that the defendants formed the company for the purpose of purchasing this option, and having induced the present stockholders to furnish $90,000 of their money to make the purchase under the false impression created by the defendants that the defendants would be compelled to pay that amount for the purchase price, and the defendants having afterwards, as officers and agents of

the company, purchased for the company such option, and paid themselves $70,000 more than they knew they could purchase it for, and $70,000 more than they had in fact paid for the same, it seems to me there can be no doubt of their liability to refund to the corporation the $70,000 so obtained. In making this statement we are not to be understood as making any charge of fraud or unfair dealing on the part of the very respectable citizens who are the defendants in this action; all that is intended is that, admitting that the allegations of the complaint in this action are true, then the result indicated follows. The truth or falsity of these statements is not now under consideration. For the purpose of this case, the defendants do not controvert them.

That the defendants were promoters of the corporation, and as such, and as the officers of the same, they assumed the position of agents and trustees of the corporation in the transaction of its business, admitting the facts as stated in the complaint to be true, there can be no doubt. This is well established by the following cases cited by the learned counsel for the appellant, viz.: *Society* v. *Abbott*, 2 Beav. 559; *Sombrero Phosphate Co.* v. *Erlanger*, L. R. 5 Ch. Div. 73; and *Sewage Co.* v. *Hartmont*, Id. 394; 1 Mor. Priv. Corp., § 291; *In re Paper Box Co.* L. R. 17 Ch. Div. 471. See, also, the case of *Railroad Co.* v. *Tiernan*, cited by the learned counsel for the respondents, 15 Pac. Rep. 558, 559. Assuming that these defendants were the promoters of this corporation, and it being alleged in the complaint that two of them were the officers of the corporation when the sale and purchase were made, they must be treated as the agents and trustees of the corporation, and as such their duties and obligations towards it are clearly defined by the authorities above cited. The learned judge, in deciding the case of *Railroad Co.* v. *Tiernan*, cites the rule of law governing their action, as laid down by the Supreme Court of Massachusetts in the cases of *Parker* v. *Nickerson*, 137 Mass. 487, and *Same* v. *Same*, 112 Mass. 195.

In these cases the rule is stated as follows: "A trustee or agent cannot purchase on his own account what he sells on account of another, nor purchase on account of another what he sells on his own account; * * * and, if he does so, the *cestui que trust* or principal, unless upon the fullest knowledge of all the facts he elects to confirm the act of the trustee or agent, may repudiate it, or he may charge the profits made by the trustee or agent with an implied trust for his benefit." See *Tyrrell* v. *Bank*, 10 H. L. Cas. 26; *Kimber* v. *Barber*, L. R. 8 Ch. 56; *Simons* v. *Mining Co.* 61 Pa. St. 202. This rule has been sanctioned and affirmed by this court. See *Puzey* v. *Senier*, 9 Wis. 370; *Pickett* v. *School Dist.* 25 Wis. 551; *Cook* v. *Mill Co.* 43 Wis. 433; *In re Orphan Asylum*, 36 Wis. 534. Construed as I think the allegations in this case ought to be construed upon a demurrer, they present the case of trustees and agents of the corporation selling property to the corporation on the one hand, and on the other hand buying for the corporation, and making a profit for themselves by the transaction of $70,000. Under the rule of law above stated the corporation may charge such profits made by the trustees and agents with an implied trust for the benefit of the corporation, and may recover such money in an action brought by the corporation.

It is urged against this claim that at the time of the sale and purchase there were no persons interested in the corporation except the said agents and trustees themselves, and so no one was injured, as all parties then interested were fully aware of all the facts. We do not think this a true statement of the case. According to the allegations of the complaint, all the present owners of the stock were interested parties. They were in fact the corporation, and the defendants represented them in making the sale, and not merely themselves. The relations which the defendants bore to the corporation in this case, according to the facts alleged in the complaint, are well stated by Chief Justice THOMPSON in the case of *Simons*

v. *Mining Co., supra.* After stating that it was claimed that the organized board of directors was the company, and whatever it did could not be inquired into by the corporation put in motion by the instance of the stockholders, he says: "This is an error, and results from overlooking the fact that directors are but the agents and trustees of the company; that they have power to act only for the interest of the company, and not against it. The shareholders constitute the company, where there is stock, and not the directors. It was therefore well put in the charge of the learned judge that the directors had no power to bind the stockholders by allowing profits to the defendants, after holding out in their prospectus that the property was obtained at original prices, and that the defendants could not claim any if they hold out that they had purchased the property for the company, and were conveying at original prices. A fraud perpetrated against the corporation by any or all of the directors may assuredly be redressed by such an action in the name of the corporation. As already said, they are its agents and trustees, which implies accountability to their principals." In the case *In re Paper Box Co.* L. R. 17 Ch. Div. 471, the master of the rolls says: "I quite agree to this: that, if promoters make an arrangement to get a profit for themselves out of what is apparently paid to the vendors, it is immaterial whether the contract with the vendors is approved by the directors of the company, who are the promoters, just before the allotment or just after. In both cases it is intended to cheat the future shareholders, and of course it makes no difference whatever that the persons who at the time the allotment was made were in fact the promoters, or their nominees, knew of the fraud." It seems to me, unless we are prepared to go contrary to the cases above cited, and to very many others cited in the brief of the appellant, we must hold that an action can be maintained in the name of the corporation to redress the wrong alleged to have been done by the defendants.

What would have been the relations of the defendants to the corporation if they had in fact owned the mining option, and had formed the corporation and issued full-paid stock to themselves for such option, and transferred such stock to themselves in payment for such mining option, and then, by exaggerated or false statements as to the value of such mining option, or as to its actual cost, had induced others to purchase from them such stock, need not be determined in this action; nor whether, in such case, any action for such fraud could be maintained by the corporation. Under the allegations of the complaint, such was not the transaction in this case. In this case no sale to or purchase by the corporation was made until all the stock, or nearly all, had been agreed to be taken by other parties than the defendants, and, although the written agreement which they signed stated that they were to buy the stock of defendants, the allegations of the complaint show that at the time such contract was signed by the present stockholders the defendants did not have or own any of the stock of the corporation, nor did they own the mining option. The allegations also show that no stock was ever issued to the defendants except to the amount of $25,000, and the balance of the stock was issued by the corporation directly to the present holders; and the mining option was bought by the defendants and sold to the company after such stock had been subscribed and paid for by the present stockholders, with the money paid by the stockholders to the corporation. What is said by the learned author (1 Mor. Priv. Corp. § 292, p. 279) in commenting upon the *Sombrero Phosphate Co. Case* is peculiarly applicable to the case at bar. In discussing the question whether the action would lie in favor of the corporation he says: "Before any shares had been issued the existence of the company was a fiction. The shareholders really formed the company, each one becoming a member when he took his shares. While the contract for the purchase of the property was nominally in force from the time of its approval

by the board of directors, yet it really took effect only after the shareholders had taken their shares. It then became binding upon all the shareholders collectively, or, in other words, on the company. The fraud really consisted in inducing the shareholders to enter into this contract in their collective capacity, and in using the funds belonging to the shareholders collectively in paying the purchase price. It is evident, therefore, that the injury to the shareholders was an injury to their collective corporate interests, and that the company was the proper complainant." These remarks are strictly applicable to the transaction in this case. It is true that it is alleged that the defendants formed a corporation under the statutes of this state, and that such corporation passed a resolution to permit the defendant Main to subscribe for the whole capital stock, and pay for it by a transfer of the mining option to the corporation; but it appears from the complaint that before this was done an agreement had been made between the defendants and the corporation that other persons should become the owners of the stock of the corporation, and pay a certain sum of money, for such stock, and thereby become the real parties constituting the corporation, and that their money should pay for the mining option; and it further appears that the transfer was not made to the corporation until after the real stockholders had become such by paying their money for the stock. The fraud in the sale was therefore a fraud upon the collective interests of the shareholders, as it was in the *Sombrero Phosphate Co. Case.*

Taking all the allegations of the complaint together, they charge the defendants with purchasing the mining option for the sum of $20,000 from themselves for the benefit of the corporation, the corporation at the time of the sale and purchase representing the present holders of its stock, and not simply the interest of themselves. That this complaint states a good cause of action in favor of the corporation against the defendants, we think, is well settled upon principle and authority.

The cases of *Sombrero Co.* v. *Erlanger*, *Sewage Co.* v. *Hartmont*, and *Simons* v. *Mining Co.*, *supra*, as well as many of the other cases cited in the brief of the counsel for the appellant, very clearly sustain this action.

It is, however, urged in a very able argument by the counsel for the defendants that, admitting the corporation would have a cause of action against the defendants for the profits made by them on the sale of the mining option to the corporation, had the corporation obtained the money with which it paid the defendants for such option in a lawful way, still, as the allegations of the complaint show that it obtained such money by an illegal issue or sale of its stock to its corporators, no action will lie to recover of the defendants any part of the money so illegally obtained by the corporation. Under my construction of the allegations of the complaint, it is very clear that the fact that the corporation received the money which paid the defendants for their mining option upon an illegal issue of its stock cannot be a defense to this action to compel them to refund to the company so much of the purchase price as was unlawfully received by them on such sale. The basis of the argument of the learned counsel is that these defendants received the money of the stockholders upon this alleged illegal sale of the stock as the agents of the corporation, and that as such agents they cannot be made to account to their principal for the money so received by them upon such illegal sales. Admitting this to be a true statement of the facts alleged in the complaint, I think, under the decisions of this and many other courts, these agents cannot set up the illegality of the transactions as a defense to an action by the principal to recover the money of its agents. I think, however, that the allegations of the complaint show that the money received on the sale of the stock was in the possession of the corporation, and not merely in the possession of its agents, and, being so in the possession of the corporation, the defendants and agents of the corporation paid it

over to themselves as the consideration for their mining option. Under the allegations of the complaint, they are not refusing to account for money collected by them as agents of the corporation in making sales of its stock, but they are refussing to account for money wrongfully obtained from the corporation upon a sale of their mining option to the company. Having changed their position in regard to this money by receiving it from the corporation as payment for the mining option sold to the company, they cannot now claim to hold it as money received by them as the agents of the corporation in making illegal sales of the stock of the corporation. The money paid to the corporation on such an illegal issue or sale of stock was, notwithstanding such illegal sale, the money of the corporation, as against all the world. The purchasers of such illegally issued stock could not recover back the money paid by them to the corporation upon such illegal transaction (see *Clark* v. *Lumber Co.* 59 Wis. 655, 661, 665, 18 N. W. Rep. 492); and, if they cannot recover it back from the corporation, no one else can. The corporation, having the possession of such money, is for all practical purposes the owner of it; and, if these defendants took the money from the corporation in an illegal and fraudulent way, it is no defense to such illegal act that the corporation obtained the money by a violation of the statute in selling its stock. If A obtains the title and possession of property from B by some fraudulent device, and C obtains the same property of A by fraud, and A brings an action against C to recover the property back, or for damages for the fraud, it would be no defense for C that A had fraudulently obtained it from B. This would certainly be so, unless B made a claim for the property against C. In this case the persons whose money came to the possession of the corporation cannot enforce any claim to it as against the corporation, and consequently they could not enforce a claim to it as against the persons to whom the corporation transferred it, and, if the present stockholders

were instrumental in bringing this action in the name of the corporation, as they must be held to be, by bringing it in the name of the corporation, they affirm the right of the corporation to the money so received by it. By what rule of law have the defendants the right to challenge the title of the corporation to the money which was paid to them upon the sale of their mining option to the corporation? I am unable to perceive any such right, especially in a case of this kind, where no other person can claim the money.

If it should be urged that the allegations of the complaint show that there are no legal stockholders, and no legal stock issued, and so no corporation which can maintain this action, it is answered by saying that the defendants are in no position to attack either the issue of the stock or the legality of the organization of the corporation. These defendants, who were the active agents in the formation of the corporation, who were instrumental in the issue of the alleged illegal stock, and who contracted with the corporation having full knowledge of all of its transactions, are in no position to contest the regularity of the formation of the corporation. 2 Mor. Priv. Corp. §§ 750–754, and the numerous cases cited in the notes; *Chubb* v. *Upton*, 95 U. S. 665–667; *Cowell* v. *Springs Co.* 100 U. S. 55, 60; *People* v. *La Rue*, 67 Cal. 526, 8 Pac. Rep. 84. In my view of the case, these defendants, as agents and trustees of the corporation, sold their mining option to the corporation, and received from the corporation $70,000 in money of the corporation more than in law and equity they were entitled to receive therefor; and in law and equity they hold this money in trust for the corporation from which they received it. That the defendants, after having obtained from the corporation its money, which, in accordance with the principles of equity, they have no right to retain, may now refuse to refund on the allegation that the corporation was not in all respects organized in accordance with law, seems to me a proposition wholly unsupported by authority, and contrary to

justice and equity. Under a proper construction of the allegations of the complaint, the illegal issue of the stock by the corporation, and the receipt of the money for such stock, was a completed transaction before the acts upon which the corporation rely for a recovery against the defendants transpired; and so the illegal act is in no way the foundation of the action. Briefly, the foundation of the claim of the plaintiff is this: The corporation having in its possession $90,000, the defendants, as agents and trustees of the corporation, sold their mining claim to the corporation for $90,000, and, acting for the corporation, they bought it for the corporation and paid out its money to complete the purchase; and that, in making such sale and purchase, they so conducted themselves that they were and are not entitled, as against the corporation, to retain the profits made on the sale, but hold such profits in trust for the corporation. Under such circumstances, it appears to me wholly immaterial how the corporation became possessed of the money received by the defendants, unless they can show that some other person or party has a better claim to such money than the corporation.

I have not discussed the question as to the right of the corporation to recover the money on the theory that they collected the same as the agents of the corporation, for the benefit of the corporation, and now hold it as such agents, because it seems to me that a fair construction of the allegations of the complaint do not show that such is the position of the defendants. If, under the allegations of the complaint, these defendants ever held this money as the agents of the corporation, they abandoned that position when they received it from the corporation as the purchase price of their mining option; and if they are entitled to hold that money at all they must hold it as vendors of such option, and as the purchase money thereof; and if they cannot, according to the rules of law and equity, hold it as such purchase money, then they must return it to the corporation. They cannot now assume

to hold it as the agents of the corporation. In receiving the money as the purchase price of their option, they abandoned their position as agents of the corporation, if they ever were such as to this money, and cannot now assume such agency to defeat a recovery. *Fox* v. *Cash*, 11 Pa. St. 207; 2 Benj. Sales 681.

We think the complaint states a good cause of action in favor of the plaintiff, and that the Circuit court erred in sustaining the demurrer to the complaint.

The order of the Circuit Court is reversed, and the cause is remanded for further proceedings according to law.

LYON, J., dissents.

JOHN W. FAIRCHILD ET AL. v. DUNBAR FURNACE CO.

(128 Pennsylvania 485; 18 Atl. 443. Supreme Court. October 7, 1889.)

[1]**Equitable ownership passes by executed contract though without seal.** A contract not under seal, whereby, for a consideration, (afterwards paid) the owner of the land agrees to "grant the right and privilege of digging all the ore in his land," is an equitable conveyance of the ore in fee, and not a mere license to take minerals, and trespass by the grantee of the owner will not lie against those claiming under such contract for removing ore from the land.

Ordinary action not convertable into suit for penalty. The common law action of trespass cannot be converted into a statutory action for a penalty (treble damages for cutting timber) by amendment of the declaration.

Error to Court of Common Pleas, Fayette County; A. L. HAZEN, Judge.

Trespass *quare clausum fregit* by John W. Fairchild and others against the Dunbar Furnace Company, a corporation. The injury complained of was the digging of ore and cutting of timber, and removing the same from plaintiffs' land, and the declaration was drawn under the common law. The action was tried on the general issue, and a verdict for plaintiffs was set aside, and a new trial granted. An amended declaration was afterwards filed, and a second trial resulted in a verdict for plaintiffs for single damages, and interest in the sum of $2,320.70, which the court trebled, and rendered judgment accordingly for $6,962.10. On a writ of error taken by defendant the judgment was reversed, on the ground principally that plaintiffs were not entitled to treble damages.

[1]*Caldwell* v. *Fulton*, 3 M. R. 238; *Hosford* v. *Metcalf*, 113 Iowa 240. Distinction stated between contract of sale and contract for sale. *Badger Co.* v. *Drake*, 88 Fed. 48.

A license coupled with an interest amounts to a lease. Full consideration of contracts of this character. *Stinson* v. *Hardy*, 27 Ore. 584; 41 Pac. 116. *East Jersey Co.* v. *Wright*, 9 M. R. 332.

15 Atl. Rep., 656. An amended declaration, claiming treble damages for the conversion of the timber, under act Pa. March 29, 1824, was filed after the action was remanded. A third trial was had under the pleas of "not guilty" and the statute of limitations, resulting in a verdict for plaintiffs, assessing damages at $1,000, and interest, $450. The court refused to treble the damages, and rendered judgment on the verdict. Both parties bring error, the opinion filed on the points arising under the assignments made by plaintiffs being here given.

R. P. KENNEDY and EDWARD CAMPBELL, for plaintiffs in error.

R. C. DALE and MESTREZAT & BOYLE, for defendant in error.

CLARK, J. The first question arising upon this record is as to the force and effect of the written agreement, dated April 1, 1854, between John Martin and his son William J. Martin. By this agreement John Martin agreed "to grant to said William J. Martin the right and privilege of digging all the ore on his place and lands; for which said William J. Martin doth covenant and agree to pay said John Martin $200," etc. The learned judge of the court below was of opinion that this was a license merely, revocable at the outset, but which, upon payment of the consideration, became irrevocable. We are clearly of opinion, however, that by the terms of the instrument William J. Martin was in equity invested with the right and title to this ore. The agreement was not under seal, nor did it contain the formal parts of a deed, but it was in writing, and that was sufficient to relieve the transaction from the ban of the statute of frauds. It was in form an executory agreement only, yet in equity it was a conveyance of the title to the ore. It was effectual to pass the title in fee, for when the consideration evinces that nothing less than a fee is

intended, equity will supply the words of inheritance. It was not only a grant of the right to dig ore; it was a grant of the right and privilege to dig "all the ore on his place and lands," and for a sum *in solido*, which was paid in full. The case bears the closest analogy in principle with *Caldwell* v. *Fulton*, 31 Pa. St. 475, the only difference being that in that case the transaction was executed by a deed, while here it is contained in an executory agreement. As the rights of William J. Martin, by a series of conveyances, have become vested in the defendant, it follows that the court was right in refusing the plaintiffs' claim for the price of the ore. The refusal was placed upon somewhat different grounds, but the result is right, and we will not find fault with the course of reasoning by which that result was obtained.

The court was also right in refusing to treble the damages. The summons was issued August 25, 1881. The action, as defined by the declaration originally filed, was an action in trespass at the common law. The amendments of November 27 and December 2, 1886, were to the same effect. Not until December 18, 1888, did the plaintiff declare specially upon the terms of the act of 1824 for treble damages. In *Hughes* v. *Stevens*, 36 Pa. St. 320, it is said: "The statutory action is cumulative to the common-law remedy, or, perhaps, rather an optional or alternative remedy, for a resort to either would be a bar to the other."

The cause of action is the matter for which an action may be brought, and it may be said to accrue when there is a right of action, a party to assert that right, and a party against whom it may be lawfully asserted. This action of trespass, being brought at the common law, was brought to redress the injury done by an award of compensation; but the action under the statute is not for a redress of the injury; it is to recover a penalty prescribed by the statute, which, as a police regulation, is intended for the protection of real property from waste by those who either negligently or willfully intrude upon

the lands of others. The cause of action accruing under this statute, although arising on the same matter, is different from that accruing at common law, and while, perhaps, they may be joined in one action, there can be but one recovery. An amendment to a declaration will not be allowed if a new cause of action is thereby introduced. It will not be allowed unless it plainly appears that the amendment is a mere specification of a claim already counted upon, especially where the new cause is so old as to have been barred by the statute of limitations. *Wright* v. *Hart*, 44 Pa. St. 454; *Smith* v. *Smith*, 45 Pa. St. 403.

The judgment is affirmed.

FULMER'S APPEAL.

[FULMER v. WILLIAMS.]

(128 Pennsylvania 24; 18 Atl. 493; 15 Am. St. Rep. 662. Supreme Court. October 7, 1889.)

The relation of co-tenant is in no sense one of partnership. Any co-tenant may work, and if he cannot get his own without taking that which belongs to his associates, and they assume not the risk, they cannot hold him for the profits.

No absolute rule of contribution can be made to apply to all cases; the circumstances of each must be considered.

[1]**Measure of Accounting for "what is justly and equitably due."** Where an adventuring co-tenant of a Slate Quarry works the same on his own account the share due the idle co-tenant is the value of the idle co-tenant's share of the slate in place, under a statute allowing him "what is justly and equitably due."

Such a value is to be ascertained, not by finding a proportionate share of the profits as if the parties had been partners but by the value of royalty customarily paid by lessees on such quarries.

Appeal from Court of Common Pleas, Lehigh County; EDWIN ALBRIGHT, Judge.

[1]*Enterprise Co.* v. *National Co.* 172 Pa. 421; 33 Atl. 637.

Action in New York against co-tenant of mine in Colorado with the holding that mining by co-tenant was a destruction of the estate and that the action would lie. *Abbey* v. *Wheeler*, 170 N. Y. 122; 62 N. E. 1074.

One tenant in common operating Salt works exclusively is liable to account for rental value. *Early* v. *Friend*, 14 M. R. 271. Full note to case as reported in 78 Am. Dec. 649.

Where an idle co-tenant claims his share of profits the question of what if any contract existed as to the amount he should receive was a question for the jury. *Southwest Coal Co.* v. *Warden*, (Pa.) 1 Atl. 421.

In accounting, co-tenant should be allowed his entire expenditure not merely his proportionate share, before decree for partition. *Holbrooke* v. *Harrington*, (Cal.) 36 Pac. 365.

One partner may sue another, in Montana, where he exercises acts of exclusive ownership in taking out ore. *Anaconda Co.* v. *Butte Co.* 17 Mont. 519; 43 Pac. 924; *Red Mt. Co.* v. *Esler*, 18 Mont. 174; 44 Pac. 523.

Where co-tenants refuse to make statement plaintiffs are entitled to accounting in equity. *Johnson* v. *Price*, 172 Pa. 427; 33 Atl. 688.

Action by Henry Fulmer against David Williams for an accounting as to slate mined by defendant from a quarry owned by them jointly.

EDWARD HARVEY, for appellant.

R. E. WRIGHT, for appellee.

GREEN, J. There is but a single and very narrow question for decision in this case. It is agreed on both sides that the defendant shall account to the plaintiff for the value of the slate in place; but, in the determination of what was the value of the slate in place, the master adopted one method, and the court another. The master held that the value of the slate

Tenant in common must account for co-tenants share, although supply inexhaustible and value of ground improved by defendants quarrying. Not chargeable for stone severed and sold where he failed to collect. *Cosgriff* v. *Dewey*, 47 N. Y. Sup. 255; Affirmed 164 N. Y. 1; 58 N. E. 1.

Mining by co-tenant may be enjoined pending determination of legal controversy between them. *Rainey* v. *Frick Co.* 73 Fed. 389.

An accounting of work done and gold got may be required of a working co-tenant. *Hawkins* v. *Spokane M. Co.* (Idaho) 28 Pac. 433; 33 Pac. 40.

An accounting will not be ordered against a hostile title until title first settled. The instances stated where an account lies in equity. *Tecumseh Iron Co.* v. *Camp*, 17 M. R. 388.

Measure of damages in accounting between a dowager and her co-tenant's interest. Value in place. *McGowan* v. *Bailey*, 179 Pa. 470; 36 Atl. 325.

Co-tenants must account for profits, not for rental value. *Williamson* v. *Jones*, 43 W. Va. 562; 27 S. E. 411.

Net proceeds of ore, how ascertained. *Yank* v. *Bordeaux*, 23 Mont. 205; 58 Pac. 42.

A life tenant has a right to receiver in nature of an auditor to see that she gets her fraction of the produce of oil wells. *Higgins Co.* v. *Snow*, 113 Fed. 433.

Measure of damages between tenants in common where one has removed coal from joint premises, including compensation for right of way over individual property. *Cecil* v. *Clark*, 49 W. Va. 459; 39 S. E. 202.

on the bank, less the cost of mining and putting it there, with a margin for a fair and reasonable profit to the operator, represented the value of the slate in place, and therefore charged the defendant with the valuation thus produced. The court, however, held that the value of the royalty or slate-leave which could be obtained for the privilege of removing and manufacturing the slate was the true representative of the value of the slate in place, and therefore reversed the finding of the master, and charged the defendant upon the latter principle. The difference in the resulting figures is very considerable, and only one of the two methods can be correct.

The act of April 25, 1850, (P. L. 573; Purd. Dig. 696, pl. 36), which subjects tenants in common in possession of mineral lands to accountability to their co-tenants for minerals taken out, provides only that the sum which "may be justly and equitably due" shall be ascertained and paid. This language is perhaps sufficiently general to give rise to different views as to what sum it is that "may be justly and equitably due" in any given case; and the solution of the question depends somewhat upon the circumstances of the particular case, and somewhat upon the true character of the relation existing between the parties. If the relation were one of partnership, of course the accounting partner would be responsible for whatever profit he might realize out of his dealing with the partnership property. In that view of the case the master's measure of liability would be certainly correct in any event, and doubtless a still more rigid accounting than he applied would have to be enforced. But the relation of tenants in common of land is not in any sense a relation of partnership. The tenant in possession may lawfully remain in possession, and may take minerals or other valuable products for his own advantage. His ownership is such that he cannot take his own share without also at the same time, and by the same act, taking the share of his co-tenant. But in mining operations there is always more or less expense and risk which must

necessarily be incurred by the person who conducts them. The tenant out of possession incurs none of the risk or expense when the mining operations are conducted exclusively by the tenant who is in possession. Nevertheless he is entitled to be compensated for the appropriation by his co-tenant in possession for his proportion of the mineral taken by the latter, whether the appropriation be profitable or otherwise to the taker.

This view of the subject simplifies and narrows the scope of the inquiry; for the thing taken is mineral in place, as it lies in a state of nature. It is this of which the tenant out of possession is deprived, and it is this for which he ought to be compensated. Where the mineral land has never been developed, and no mines or quarries have been opened, the fair market value of the mineral in place, which would be the value of the privilege of removing it, in view of all its special circumstances, would represent the true measure of compensation to the owner. So, too, if the land were fully developed, and mines or quarries opened, and all the expenses incurred which enable the operator to proceed at once to the taking of the mineral, the value of the mineral in place, ready to be taken, would be enhanced by these considerations; and the price of the privilege of taking it, in such circumstances, would also represent the measure of compensation. It is manifest that, in conducting this inquiry in a litigated case, regard should be had to all the circumstances of the particular case, and the evidence should be directed to the special instance of the mine or quarry in question.

A reading of the testimony taken before the master shows that this is precisely what was done in the present case. On the part of the defendant a number of witnesses, all of them having competent knowledge of the property, and being themselves engaged in the same business, and thoroughly qualified to speak of the value of the privilege of removing the slate from this particular quarry, testified to their opinion of the

value of that privilege as represented by a fixed price for the several kinds of slate produced. They took into their view all the circumstances of advantage and disadvantage in mining, preparing and marketing the slate taken, and expressed their results in definite figures. Reviewing carefully, and, as we think, correctly, the whole of this testimony, the learned court below determined upon certain values for school slate, roofing slate, and mantel and blackboard stock taken out, and embodied them into a resulting decree, the fundamental idea of which was that they represented the royalty or slate-leave at which the quarry could have been let. For the legal correctness of this treatment of the subject, the case of *Neel's Appeal*, 3 Penny. 66, was referred to, and it appears to support the reasoning of the court and the defendant's contention. We think, moreover, it is the just and equitable method of determining the value of the slate in place, when compensation for its removal is claimed by a tenant out of possession against a co-tenant in possession.

The learned master reached a different conclusion as to the manner of determining the value of the slate in place, influenced largely by the decision of this court in the case of *Coleman's Appeal*, 62 Pa. St. 252. An examination of that case, however, proves that it was altogether exceptional in its character, and was expressly limited to the particular facts under consideration. The general principles stated in the opinion are in entire harmony with the views herein expressed. Thus, Mr. Justice SHARSWOOD, in delivering the opinion, said: "The value of the ore in place is therefore the only just basis of account. This is the same as the value of what is called 'ore-leave;' that is, what the right to dig and take the ore is worth." He then inquires: "But how is the value of ore-leave to be ascertained?" He proceeds to review the special facts of the case, and says that the value of the ore at the pit's mouth depends upon its quality, its proximity to the furnace where it is to be used, and the means of transportation; that in addition

to this the price of the ore-leave will be influenced by the expense and risk of mining; that the price paid for ore-leave in other mines affords no criterion for this; that no sales of Cornwall ore-leave had ever been made; and that no evidence was given before the master as to what ore-leave from this bank would have commanded on the market. He adds that the master arrived at the value of the ore in place by ascertaining its value at the pit's mouth, and then deducting from that the cost of mining, and says: "We cannot see that, under all the circumstances, any more just and equitable mode could have been adopted." But he takes care to say further: "We do not mean to say that it would hold in any other case than the one now before the court—certainly not where the mining is expensive and hazardous. * * * But the case of the Cornwall ore-banks is very different and very peculiar. Very little outlay of capital was required—the wages of day-laborers, and the pick, axe, and shovel, with occasional charges of powder for blasting, made up all that was to be provided. The returns were immediate. The ore was removed, to be used or sold, as soon as loosened. No personal skill or superintendence by the tenants in common was shown, and whatever was necessary was hired and allowed in the cost of mining." The whole tendency of the opinion was to show that there was no substantial difference between the value of the ore in place and its value at the pit's mouth, except the mere cost of digging and of removing it from the one place to the other. This, added to the fact that there never had been any sales of ore-leave at the Cornwall banks, and no proof of the opinions of experts as to what such ore-leave was worth, impelled the adoption of the principles upon which the value of the ore-leave was determined. There was, in fact, no other method which could have been adopted in that case, under the evidence on the record.

In the present case it is only necessary to note the fact that abundant evidence was given as to the value of the royalty or

slate-leave in this particular quarry by very experienced persons who knew it well, and had long been engaged in the same business; and the further fact that the value of the slate on the bank included, in addition to the cost of severance and removal, the cost also of splitting, dressing and piling the roofing slate, and splitting the school slate and mantel and blackboard stock. In addition to this, personal skill and superintendence were required. As to the roofing slate, the whole profit of manufacture thus enters into its cost on the bank, and a portion of that profit enters into the cost of the school slate and other stock. It follows that, if the method adopted by the master is pursued, the plaintiff would recover, in addition to the real value of the slate in place, a share of the profits of carrying on the business, without being subject to the risks or possible losses which might accrue; and this we think would not be just and equitable. The amounts allowed by the court are very fair and liberal to the plaintiff, under all the evidence, and he has no just cause of complaint.

The case of *Ege* v. *Kille*, 84 Pa. St. 333, was not a proceeding between tenants in common, but an action of trespass for mesne profits, and therefore a rather more stringent rule of accounting would be applicable to its facts. But in addition to that consideration it was a case of iron-ore mining, and came practically within the exceptional doctrine of *Coleman's Appeal, supra*, which it simply followed. That doctrine, however, as we have seen, has no general application, and is not controlling in cases circumstanced like the present. *The decree of the court below is affirmed, and appeal dismissed, at the cost of the appellant.*

C. C. DUFFIELD v. F. P. HUE ET AL.

(129 Pennsylvania 94; 18 Atl. 566. Supreme Court. November 4, 1889.)

[1]**Lease and sale distinguished.** A grant of "the exclusive right and privilege of digging and boring for oil and other minerals," for the term of fifteen years from the date thereof, must be treated as a lease for the production of oil, and not as a sale of the oil or of an interest in the land.

Limitations to parol explanations. While parol evidence is admissible to ascertain the nature and peculiar qualities of the subject matter of a contract, and to show the situation of the parties with respect to it, yet, where there is no latent ambiguity involved, the construction of the contract is for the court.

Lands omitted from description. The court not finding either fraud or mistake in the making of an oil-lease, parol evidence offered for the purpose of showing what lands, not embraced in the description, were intended to be included in the grant, is not to be admitted in aid of construction.

Representative of deceased party as witness. When the lessor of an oil-lease is dead, and his right, under and subject to it, by his own act or the act of the law has passed to the defendant in an ejectment, who represents his interest in the subject in controversy, neither the surviving party to the transaction sought to be proved, nor the plaintiff in the action, though released by the party offering him, is a competent witness.

Idem. It does not follow, that in all cases where a party to an action derives his title through or under a deceased grantor, neither party can be a witness; it is where a party to a thing or contract in action is dead, etc., and a party to the action represents his interest in "the subject in controversy."

Idem. As a person cannot be supposed to become a party to a thing or contract in action, until after the thing or contract in action has come into being, this rule of incompetency cannot arise until the thing or contract in action, "the subject in controversy," exists.

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[1]*Fairchild* v. *Dunbar Co.* 17 M. R. 242. Distinction stated between lease and license. *Malcomson* v. *Wappoo Mills*, 85 Fed. 907. *Stinson* v. *Hardy*, 27 Ore. 584; 41 Pac. 116.

Distinction between lease and agreement for lease. *Diamond Co.* v. *Curless*, 22 Ind. App. 346; 52 N E. 782.

Sale of the gas by the lessee to a company which takes charge of the

Written control printed words. Where a contract is partly printed and partly written, the written words are entitled to have greater effect given them in the interpretation of the contract, than those which are printed, for the written words are the terms selected by the parties themselves, to express their meaning in the particular case.

[2]**Waiver of forfeiture.** The right of the lessor in an oil lease to insist upon a forfeiture by reason of a failure of the lessees to put down a seventh well in a stipulated time, is waived by his acquiescence in the failure to put down two or three of the preceding six wells within the periods stipulated in the lease.

Error to the Court of Common Pleas of Warren County.

The testimony of F. M. Pratt was offered in connection with a release from plaintiff to witness "of all liability upon any covenants that may be in his conveyance, or that he may have of any kind against witness by reason thereof"; also a similar release to witness from his assignee, who was plaintiff's assignor; also a similar release from plaintiff to his assignor and witness. Defendants prevailed below, and plaintiff brings error.

W. M. LINDSEY and S. T. NEILL, for plaintiff in error.

CHARLES DINSMOOR and JAMES CABLE, for defendants in error.

CLARK, J. This is an ejectment, brought in the Court of Common Pleas of Warren County by C. C. Duffield against F. P. Hue *et al.*, to recover the possession of a lot of ground containing two acres, more or less, in Clarendon. The lot is conceded to have been part of the tract No. 497, in Meade township, of which tract C. R. Elston was the owner, and

well is really a sub-lease of the well itself. *Stone* v. *Marshall Co.* 188 Pa. 602; 41 Atl. 748.

A parol lease is valid—facts stated on question whether a party went in as an employee or lessee. *Ruffatti* v. *Societe Anonyme*, 10 Utah 386; 37 Pac. 591.

[2]*Steiner* v. *Marks*, 172 Pa. 400; 33 Atl. 695.

this is the common source of title. January 23, 1880, Elston's heirs leased part of tract 497, including the lands in dispute, to Thomas and Henry Brown, for oil-mining purposes; and January 20, 1882, the Browns sublet to F. M. Pratt. The whole controversy arises upon the proper construction of the last-mentioned lease. The plaintiff's contention is that although, upon a literal and strict reading of this lease, it might appear merely to designate certain sites upon which Pratt was privileged to operate for oil, yet his rights really extended to all that part of tract 497 covered by the Elston lease of January 23, 1880, and to all the underlying minerals. In order to establish this he introduced parol evidence of the declarations and admissions of Henry W. Brown, made subsequently to the date of the Pratt lease, as to the extent thereof, and by this means sought to modify the descriptive parts of the lease so as to include the mill-yard, which is the premises in dispute. Duffield, the plaintiff, offered himself as a witness, and called F. M. Pratt, both proposing to testify as to matters occurring between them and Henry W. Brown, who died prior to the bringing of this suit. The learned judge of the court below, admitting the evidence which exhibited the situation of the parties with reference to the premises at the time the lease was made, rejected all parol proof offered for the purpose of showing what lands, not embraced in the description, were intended to be included in the lease; and also the evidence of Pratt and Duffield as to matters occurring in the lifetime of Brown. The first seven specifications of error are directed to these rulings of the court.

The lease from Brown to Pratt, as we have said, was made January 20, 1882, and the plaintiff has succeeded to the rights of Pratt and Duffield. After the assignment of Pratt's interest to Duffield, the interest of the Browns was sold at sheriff's sale, and purchased by one Rosenweig, who, on the 16th of January, 1886, executed a lease to the defendants, Hue and Gerould. Thus it appears that the rights of the present parties are

wholly dependent upon the terms, conditions, and proper construction of the lease from the Browns to Pratt, dated 20th January, 1882. H.W. Brown died about the month of August, 1885.

The act of 23d May, 1887, provides that "where," etc., "any party to a thing or contract in action is dead," etc., "and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record, who represents his interest in the subject in controversy," neither "any surviving or remaining party to such thing or contract, nor any other person whose interest shall be adverse to the said right of such deceased party, shall be a competent witness to any matter occurring before the death of said party," etc., "unless," etc. The thing in action here is the plaintiff's right to the possession of the premises in dispute under the lease of 20th January, 1882. W. H. Brown was party to that lease, and his right under and subject to it, by his own act or the act of the law, has passed to the present defendants, who represent his interest in the subject in controversy; and, as Brown is dead, it would appear to follow from the provisions of the act of 23d May, 1887, however it might have been before the passage of that act, that Pratt, the surviving or remaining party, was not a competent witness to any matter occurring before Brown's death. The policy of the statute is to prevent inequality, and it is upon the ground of policy, and not interest, that Pratt is incompetent.

It does not follow, however, that in all cases, if a party derives his title through or under a deceased grantor, however remote, neither party can be a witness; for this, in the trial of an ejectment, would be a practical exclusion of the parties. It is where a party to a thing or contract in action is dead, etc., and another represents his interest in "the subject in controversy." This rule of incompetency cannot arise until the thing or contract in action exists; for a person cannot be supposed to become a party to a thing or contract in action until after the thing or contract in action has come into being. The

subject in controversy in this instance originated in the execution of the lease; and the plaintiff's right under that lease, as we have said, is the thing or contract in action. It was Brown's right in his lifetime, as it is the defendant's right now, to stand upon the terms of that lease; and as Brown's interest then was adverse to the plaintiff's claim now, to-wit, that the lease did not set forth the contract of the parties, the policy of the statute must be held to apply; and as Pratt's incompetency does not arise out of his present interest, and Duffield was himself a party to the suit, the releases were of no avail to remove their disqualification.

Nor do we think the court erred in rejecting the parol evidence of other witnesses offered for the purpose of showing, in modification of the description, what land was intended to be included in the lease. This evidence on part of the plaintiffs consisted largely of loose declarations of H. W. Brown, as to what lands had been leased to Pratt. The learned judge of the court below, to whom the case was referred under the act of 1874, did not find any fraud or mistake in the making of the lease; nor is there any evidence to support it if there had been any such finding. Indeed, we do not understand that either fraud or mistake is alleged. It was competent, of course, by parol evidence, to ascertain the nature and peculiar qualities of the subject of the contract, and to show the situation of the parties with respect to it; but, as there was no latent ambiguity in the contract, its construction was for the court. The lease itself is not only the best, but the only, evidence of the agreement of the parties; for whatever Brown may have said at various times as to the extent of the lease, and whatever his motives may have been for so saying, its actual extent must be ascertained from the language of the lease, which must be assumed to contain the deliberate and final engagements of the parties. The lease consists partly in a printed formula, prepared for oil leases on the tract 498, and partly in written words inserted therein; and the

printed number, 498, it is conceded should have been changed to 497. It is undoubtedly true that in such case the written words are entitled to have greater effect in the interpretation than those which are printed, for the written words are the terms selected by the parties themselves to express their meaning in this particular case; whereas the words of the printed form are of a more general character, originally chosen for application to similar subjects only, and frequently, as in this case, are, by necessary alterations and changes, made to express, as near as may be, the intention of the parties. *Grandin* v. *Insurance Co.* 107 Pa. St. 31; *Haws* v. *Association*, 114 Pa. St. 431, 7 Atl. Rep. 159. While, by the printed form, the leased premises are described as "a certain lot or piece of land situate," etc., it is plain from the written clauses that the premises were to be operated at certain designated points or "sites" only. These sites are specifically described as follows: "Each site is situated on lots numbered, respectively, on map, one fifty-one Mill street, one ninety-three Center street, and one sixty and one thirty-four on Elston street; and also sites for three wells, situate, per plot number one, south side of Philadelphia & Erie Railroad, to be designated and mutually agreed upon by both parties." The rights of Pratt as lessee for oil-mining purposes are plainly restricted to these sites. It is provided that he is to have the privilege of drilling other wells on the same premises only in the event that the Browns might determine to have more wells drilled, and then the operations were to be conducted on the same terms. While the lease, in some sense, may be said to cover the entire lot for oil-mining purposes, yet it is plain that operations were restricted to the sites mentioned.

Whatever oil might be produced from the premises leased at these points the lessees had a right to produce; but they had no right of possession, for any purpose, at any other place within the bounds of the territory described. If the lessors, or others acting under them, by boring other wells, lessened

this production, or otherwise disturbed or interfered with the rights of the lessees, they may have had their remedy, but not in this form, for by no construction of the contract in question can Pratt be supposed to have had any right of possession, for any purpose, in any part of the premises in dispute; and Duffield, in his right, has therefore no standing to recover in ejectment.

Upon the question of forfeiture, we think the views expressed by the court are correct: "Whatever right the lessors may have had to insist on the forfeiture of the Pratt lease by reason of failure to put down the seventh well within the stipulated time was waived by their acquiesence in the failure to put down two or three of the preceding six wells within the stipulated time. * * * The lessee might well believe, from such acquiescense, that strict performance of the terms of the lease as to the time of putting down the wells would not be insisted on, and that a reasonable notice should be given before a forfeiture could be claimed on account of failure to sink the seventh well." The writing of January 20, 1882, from what has been said, must be treated as a lease for production of oil, and not a sale of the oil or of the land, and the defendants had a right to stand upon their title.

The judgment is affirmed.

[1]CHEESMAN ET AL. V. SHREEVE ET AL.

(40 Federal 787. In the Circuit Court of the United States: District of Colorado. December 26, 1889.)

Discovery shaft must show mineral or well-defined crevice. It is requisite to a valid location and to the ownership of the title to a valid lode mining claim, that there should be a discovery of ore, gold or silver bearing mineral in rock in place, showing a well-defined crevice, a discovery shaft at least 10 feet deep from the lowest rim thereof, which discovery of mineral must be at the point claimed and designated, or made the point of discovery by the locators of said claim, and so designated in the location certificate relied upon by them in the making of said location.

A location stake must be erected at the discovery of said claim, with a plain sign or notice thereon, containing the name of the lode, the name of the locator, and the date of the discovery.

The claim must have its boundaries so marked upon the surface as to be easily traced by means of six substantial stakes, one set at each corner of said claim, one at the center of each side line thereof; which stakes shall be of substantial character, and sunk in the ground, hewed on the two sides of the corner stakes which are in towards the claim, and the side stakes hewed on the side which is in towards the claim.

Essentials of location certificate. There must be made and filed by the locators of said claim a location certificate which shall contain the names of the locators, the date of the location, and such a description of the claim by reference to some natural object or permanent monument as will identify the claim; also, the number of feet in length claimed on each side of the center of the discovery shaft, and the general course of the lode.

The certificates of location are presumptive evidence of discovery and that the locators had complied with the law.

Apex running through group of claims. In a suit for trespass, defendants cannot, after suit brought, unite several claims, each having a portion of the outcrop, for the purpose of asserting the right to follow a vein upon its dip, when said right does not exist within the said claims, considered separately.

Relocator has no right to connect with the old title. If ground once included within the location of a lode mining claim be abandoned, and a new location made thereon, as abandoned ground, said location dates only from the relocation thereof and does not relate back to or obtain any rights on account of the location which has been abandoned.

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[1] S. C. styled *Cheesman* v. *Hart*, 16 M. R. 263, on motion for new trial.

Lode defined. A vein or lode is a body of mineral or of mineralized rock in place, within defined boundaries, in the general mass of the mountain.

[1]**Ore disseminated at intervals, or found in channels,** chutes, cavities, pockets, or other irregular occurrences at intervals in quartzite, without ore connections between the same, is not a lode, ledge, or vein, within the meaning of Rev. St. U. S. § 2322, allowing the owner thereof to follow the same beyond his side lines upon its dip.

Continuity of vein. The vein must be continuous only in the sense that it can be traced by the miner through the surrounding rocks. Slight interruptions of the mineral-bearing rock are not alone sufficient to destroy the identity of the vein; nor would a short partial closure of the fissure have the effect to destroy the continuity of the vein, if, a little further on, it appeared or recurred again, with mineral-bearing rock in it.

Close or disappearance of the vein. Where both mineral and fissure close, come to an end, and are not found again in that direction, or, if found at all, are so far off from the tracing of the vein, or so diverted from its original trend or line, or appear under different geological conditions and surroundings, the jury would be warranted in finding that the continuity was broken, and that the lode, therefore, was not the same.

End lines must cross the outcrop. End lines designated in the location certificate are not necessarily, in law, the end lines, unless they actually cross the actual outcrop of the vein.

Measure of damages. Confusion of ores. If the jury believe from the evidence that defendants, after knowledge that plaintiffs contested their rights to the mine within the side lines of plaintiffs' claim, thereafter mingled the ore taken from within plaintiffs' side lines with other ore, with the purpose of preventing or obstructing the ascertainment of its quantity and value, or in willful disregard of plaintiffs' rights, they would be warranted in construing such conduct against defendants in determining the damages.

Idem. Ores mined and marketed in good faith. If, on the other hand, they believe that defendants, in the honest belief that they were pursuing their own vein of ore, and without any design to cover up the quantity or value of ore taken, and in the usual mode of handling and marketing such ore, suffered it to mingle with other ore, or failed to keep it segregated, then the jury should ascertain the approximate value of the ore, as best they could, from all the facts before them.

At Law. Action of ejectment.

[1] A lode means any body or belt of mineralized rock. *Book* v. *Justice Co.* 17 M. R. 617.

A belt of porphyry containing mineralized seams is a lode. *Id.*

C. J. HUGHES, JR., for plaintiffs.

B. F. MONTGOMERY and C. C. PARSONS, for defendants.

PHILIPS, J., [*charging jury*]. Gentlemen of the jury: Before proceeding to give you the charge I have prepared, I will give you certain declarations of law, asked for by the plaintiffs, as not inapplicable to the consideration of this case:

"The court, at the instance of the plaintiffs, charges the jury that their verdict must be for the plaintiffs, unless the defendants fully establish, by a preponderance of the evidence, the following facts,—that is to say, that they are the owners of a lode mining claim located and held in compliance with the statutes of the United States and the State of Colorado, permitting and governing the location of gold mining claims; that, among the requisites to a valid location and to the ownership of the title to a valid lode mining claim, are the following: *First.* That there should be a discovery of ore, gold or silver bearing mineral in rock in place, showing a well-defined crevice, a discovery at least ten feet deep from the lowest rim rock thereof; which discovery of mineral must be at the point claimed and designated, or made the point of discovery by the locators of said claim, and so designated in the location certificate relied upon by them in the making of said location. *Second.* The erection of a location stake at the discovery of said claim, with a plain sign or notice thereon, containing the name of the lode, the name of the locator, and the date of the

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Where a vein or lode has been discovered its continuity, width and extent are jury questions. *Id.*

What is a lode is a question of fact and involves no federal question. *Bluebird M. Co.* v. *Largey*, 49 Fed. 289. The same as to what is an apex. *Id.*

Lode defined. Includes all mineralized deposits. Location on float upheld. *Hayes* v. *Lavagnino*, 17 Utah 185; 53 Pac 1029. *Shoshone Co.* v. *Rutter*, 87 Fed. 801.

Where deposits are separated in to three well defined parts having distinct walls each part is a separate vein although there are seams between them. *Doe* v. *Waterloo M. Co.* 54 Fed. 935.

The size of the lode is immaterial. *Stinchfield* v. *Gillis*, 17 M. R. 497.

Continuity of lode is not destroyed by complications or spurs. *Pennsylvania Co.* v. *Grass Valley Co.* 117 Fed. 509.

Rock in place as contradistinguished from the soil and debris. It is rock in place though loose, broken or disintegrated. *Jones* v. *Prospect Mt. Co.* 17 M. R. 530.

discovery. *Third.* That said claim must have its boundaries so marked upon the surface as to be easily traced by means of six substantial stakes, —one set at each corner of said claim, one at the center of each side-line thereof,—which said stakes shall be of substantial character, and sunk in the ground, hewed on the two sides of the corner stakes which are in towards the claim, and the side stakes hewed on the side which is in towards the claim. *Fourth.* That there shall be made and filed by the locators of said claim a location certificate, which shall contain the names of the locators, the date of the location, and such a description of the claim by reference to some natural object or permanent monument as will identify the claim; also, the number of feet in length claimed on each side of the center of the discovery shaft, and the general course of the lode; it being provided by law that any location certificate of a lode claim which shall not contain the name of the lode, the name of the locator, the date of location, the number of linear feet claimed on each side of the discovery shaft, the general course of the lode, and such description as shall identify the claim with reasonable certainty, shall be void.

"The court further charges the jury, at the instance of the plaintiffs, that the defendants cannot unite several claims, each having a portion of the outcrop, for the purpose of asserting the right to follow a vein upon its dip, when said right does not exist within the said claims, considered separately: provided such union of claims was made after suit brought; and therefore this does not apply to the union of the old Champion and Nevada claims.

"The court, at the instance of the plaintiffs, further charges the jury that, if ground once included within the location of a lode mining claim be abandoned, and a new location made thereon, as abandoned ground, said location dates only from the relocation thereof as abandoned ground, and does not relate back to or obtain any rights on account of the location which has been abandoned, and that the law makes a distinction between a relocation and an amended location certificate, although both may be designated as amendments in such location certificates.

"The court further charges the jury, at the instance of the plaintiffs, that, in addition to establishing by preponderance of testimony that they are the owners of the Champion, Widow McCree and Peerless lode mining claims, and that the same are located and are situated with reference to the outcrop at the surface claimed by the defendants as to their side lines and end lines, and of their discoveries as hereinbefore charged, they must prove and establish to your satisfaction, by a clear preponderance of testimony, the further fact that there outcrops, within said claims as hereinbefore stated, a vein, lode, or ledge, within the meaning of the law, descending upon its dip continuously, on ore of appreciable value in gold and silver, to the ground in controversy; and that the ore from within the Battle Mountain and Little Chicago lode mining claims is a part and portion of such a lode or ledge, and not of an ore deposit or body having its

source or origin higher up, within the boundaries of the Battle Mountain or Little Chicago lode mining claims, than where it was found. That, in order to the existence of such a vein, there must be proved, by a preponderance of testimony, to exist, a lode, ledge, or vein, within the meaning and purview of the statute, having lateral extent as well as extent upon its dip, and being a continuous mass of mineral, between defined boundaries, in the solid mass of the mountain, extending continuously upon its dip to the ground in controversy; and that the existence of detached or small bodies of ore upon one line, or upon or within a given stratum of rock, unless the remainder of said stratum contains the elements which constitute a vein, to-wit, defined walls and crevice, continuous ore, and mineralization of an appreciable value, throughout its extent, the same is not, within the statute, such a lode, ledge, or vein as entitles the owner thereof to follow the same beyond his side lines upon its dip.

"The court further, at the instance of the plaintiffs, charges the jury that ore disseminated at intervals, or found in channels, chutes, cavities, pockets, or other irregular occurrences at intervals in quartzite, without ore connections between the same, is not a lode, ledge, or vein, within the meaning of the statute.

"The court further charges the jury, at the instance of the plaintiffs, that end lines, as designated in the location certificate, are not necessarily, in law, the end lines, unless they actually cross the actual outcrop of the vein."

Now, gentlemen of the jury, the plaintiffs have shown title, by patent from the United States and mesne conveyances, to the mining claims known in this trial as the "Battle Mountain and Little Chicago." By the terms of the grant under the patent, the right of possession and ownership are vested in the grantee, not only to the surface of the ground contained within the exterior lines of such surveys, but to everything beneath, within the planes lying within lines drawn downward, vertically, between such surface boundary lines. The plaintiffs have made out a *prima facie* case to recover in ejectment by proof of title through patent and subsequent conveyances to them; the answer of defendants admitting that they had, in excavating, penetrated beneath the surface location of the Battle Mountain survey. While this is so respecting the operation of the patent, the statute law of the United States (section 2322) makes this important provision respecting the rights of a locator who may not have received a patent:

"The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the 10th day of May, 1872, so long as they comply with the laws of the United States and with state, territorial and local regulations not in conflict with the laws of the United States, governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward, vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of such surface locations."

This right of the locator has its root in the same statute that gives patentee his patent; so that, if the defendants have brought themselves within the provisions of this statute, and they reached the point of the alleged trespass by pursuing and excavating a vein of ore which had its outcrop or apex within the side lines of their location, and their location was conformable to law respecting this vein, they are not guilty of the alleged trespass. The evidence on the part of the defendants tends to show that the discovery on the Champion claim, in its original form, and the location were made in 1880, and that in 1882 a relocation of this claim was made, and in 1886 an amended location thereof was made by defendants, enlarging its extent. The evidence also tends to show that the Widow McCree claim was discovered and located in 1885, and that the title of said locators has passed, by mesne conveyances, to the defendants, or some of the parties who are operating the mine as partners. The Widow McCree claim, as located, extended north, so as to include a part of what appears on one of the maps as the "Belle of the East Claim." The locators, or those holding under them, had the right, by the local statutes of Colorado, to alter or amend the original location at any time up to the institution of this suit, and such amendments or relocations, when made, had relation back to the time of the original location; and these plaintiffs are in no

position, in this controversy, to question such amendments or relocations. And, while it is true that, in order to authorize the location of these claims, the locator should have made a discovery thereon of a vein of mineral ore, and done certain work thereon, and complied otherwise with the law regulating such locations, yet you are instructed that the certificates of location are presumptive evidence of such discovery; and that the locators had complied with the law in this respect; and that, after the lapse of many years, as in this case, every reasonable presumption should be indulged by the jury in favor of the integrity of the location; and that where, as in the case of some of these claims, the original locators reaffirmed, under oath, on the witness stand, that at the point of their workings named in their location entry they did discover such vein, then, when the plaintiffs come here, after the lapse of so many years, and undertake to show, by witnesses sent to these old openings, with their accumulated *debris*, to obtain evidence by inspection that no vein was in fact found by the original locators, such attack should be sustained by evidence so clear and persuasive as to fully satisfy your minds that such claimed discoveries were in fact false. And you are further instructed, in this connection, that, if you believe from the evidence that such locators did make such discoveries of an ore vein, the defendants, in further and later openings of such mine, would not be confined to the point where such original openings or workings were made, because, by the express terms of the federal statute, (section 2322,) such locators "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward, vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations."

If you find and believe from the evidence that, since defendants took possession of the several claims in what is called the "Champion Group" as far back as 1886, under the title-deeds in evidence, they have held and treated them as an entirety,—as one property,—and prosecuted the extent of work shown in evidence as a system of development of the whole, then said several claims may be regarded as one, for the purposes of this case, and the work prosecuted by the defendants thereon as having been done for the whole. To justify the subversion by the defendants of the territory underlying the plaintiffs' surface location, it devolves upon them to show by evidence that a vein, lode or ledge of mineral ore had its outcrop or apex inside of the surface lines of their location, and that they so reached the point of the alleged trespass by pursuing such vein from its outcrop or apex. The statute of the United States also requires that the end lines of the claims should be parallel with each other, and, in asserting a right to follow the vein on its dip without the side lines of their location, and into plaintiffs' location, defendants must show the outcrop or apex of such vein or lode to be in their own location throughout the ground in controversy, being the extent of the locations of defendants and plaintiffs parallel to each other.

If you find, from the evidence before you, that the end lines of the defendants' claim are substantially parallel with each other, that will meet the requirements of the law in respect to such parallelism; and, in considering this issue, you will disregard the fact that the south end of the Champion claim extends beyond, or is intercepted by, the Pacific survey; and you will also disregard the fact that the north end of the Widow McCree claim, in a contest with the Belle of the East claim, may have been adjudged by the court in favor of the latter, if you should further find the fact to be that subsequently, in 1888, and prior to the alleged trespass, the said Belle of the East quitclaimed back to defendants said interest,

and that defendants have continually since, as theretofore, without any interruption of their possession, held and claimed the same as one entire claim, as formerly located, and that the workings performed and prosecuted by them on the so-called claims were done in development of their group of claims as an entirety. The statute further provides that the right of such locators of possession to such outside parts of such vein shall be confined to such portions thereof as lie between vertical planes drawn downward, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such vein.

If you are satisfied, from the evidence before you, that such end lines of the defendants' claims are substantially parallel, as heretofore defined, and that the point where the excavation was made by defendants within the side lines of the Battle Mountain claim was substantially within the planes of the end lines of the defendants' claims, drawn vertically downward, and continued in their own direction, you will then be brought to the more important controversy here, as to whether or not there was a vein or lode of mineral ore having its apex or outcrop inside of the side lines of the Champion claim, in pursuing and excavating which the defendants or their lessees penetrated within the side lines of the Battle Mountain location; and, for the purposes of this case, the west end line of the Battle Mountain claim is to be regarded as such side line. If the defendants did reach the point in question by so following up such vein, they are not guilty of the alleged trespass.

It is difficult, gentlemen of the jury, for the court to define and lay down in so many words the exact meaning of the terms "vein," "lode," or "ledge," which are employed in the statute interchangeably. It is questionable, to my mind, whether the term is susceptible of an arbitrary definition, or whether one in set phrase should be given so unvarying as

to apply to every case, regardless of the differing conditions of locality and mineral deposit. The philologist would, in general terms, define a vein to be "a seam or layer of any substance more or less wide, intersecting the rock or stratum, and not corresponding with the stratification, and is often limited, in the language of miners, to such a layer or course of metal or ore." In the judgment of geologists, a fissure in the earth's crust, and openings in its rocks and *strata* made by some force of nature, in which the mineral is deposited, is regarded as important, if not essential; "but," as has been said by an eminent judge, "to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for, and reasonably expect to find, the ore he seeks. A continuous body of mineralized rock, lying within any other well-defined boundaries on the earth's surface, and under it, would equally constitute, in his eyes, a lode. We are of the opinion, therefore, that the term as used in the acts of congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock." (*Eureka Case*, 4 Saw. 311.)

As applied to the case on trial, I may, perhaps, safely give you in charge, in its essential substance, the general definition and rules which have been approved in this jurisdiction, and affirmed by the highest authority in our country, the supreme court of the United States. In general, it may be said that a vein or lode is a body of mineral or of mineralized rock in place, within defined boundaries, in the general mass of the mountain. The vein which the miner pursues from its outcrop must, of course, be the same which he pursues outside of his side lines. Such vein need not, however, be a straight line, of uniform dip or thickness, or richness of mineral matter, throughout its course and length. Generally speaking, veins are found, when the mineral is extracted, in what constitutes clefts or fissures in surrounding walls, with

a well-defined or traceable hanging wall, or roof above and foot-wall below, of different kinds of rock. So long as the inclosing walls can be continually traced, and like mineral matter found therein, no doubt can exist that it is the same vein; but sometimes these clefts diminish so as to be scarcely perceptible, and, again, for a short distance, these fissures disappear to the eye and touch of the explorer, and then, a little further on, on the same plane, they are found again; and there may be spots or short spaces where the overhanging wall and the under-floor rock exist while the mineral deposit is not present, but on following the fissure or trend it reappears very soon. The jury will be sufficiently guided in such instances by keeping in mind that the vein or lode must be continuous only in the sense that it can be traced by the miner through the surrounding rocks; that is, slight interruptions of the mineral-bearing rock are not alone sufficient to destroy the identity of a vein; nor would a short, partial closure of the fissure have the effect to destroy the continuity of a vein, if, a little further on, it appeared or recurred again, with mineral-bearing rock in it.

Where both mineral and fissure close, come to an end, and are not found again in that direction, or, if found at all, are so far off from the tracing of the vein, or so diverted from its original trend or line, or appear under different geological conditions and surroundings, the jury would be warranted in finding that the continuity was broken, and that the lode, therefore, was not the same; but, where well-defined boundaries, characterized by a generally uniform hanging wall and floor, and extending on a like general plane or dip, exist, slight evidence of ore may establish the existence of a lode. Such characteristic boundaries "constitute a fissure, and, if in such fissure ore is found, although at considerable intervals, and in small quantities, it is a lode or vein, within the meaning of the law." It is claimed, for instance, on the one side, that, while on the plane or line where the Champion tunnels run

there may be found mineral matter permeating more or less the rock formation, and that here and there ore deposits more or less valuable may have been found, yet that such deposits of ore were only found in vugs, or, as some of the witnesses term it, "bugs," in small quantities, lying in no general direction, widely separated, and found in the excavations only after driving the tunnel for considerable distances through hard quartzite rock; and that these vugs of ore lay in detached cavities, more or less like a trough, wholly surrounded by or enveloped in such quartzite rock. If you should conclude that this was the fact respecting the condition and character of the Champion workings, then there would, in contemplation of law, be no vein of mineral ore there. A "vug" is defined by Webster to be "a cavity in a lode or vein," which would imply that such cavities were in veins; but such technical definition of the term must yield to the sense in which the witnesses employed it, and defined it, on the stand. If, on the other hand, you should find and believe from the evidence that the ore deposits were traced from the outcrop, and were deposits of like ore in cavities lying or running in a general direction or dip into the mountain, on a plane more or less uniform, and found to constitute a net-work of ore closely adjacent and near to, and often running into, each other, and within a general wall above and below, even though here and there separated in their course by quartzite rock containing like mineral matter for only short distances, this of itself would not necessarily break the continuity of the lode, as heretofore defined. In this connection, gentlemen, I appropriate part of a charge given by Judge HALLETT in *Hyman* v. *Wheeler*, 29 Fed. 353, which is as follows:

"In the books, and among miners, veins and lodes are invested with many characteristics,—as that they lie in fissures or other openings in the country rock; that they contain materials differing, or in some respects corresponding, with the country rock; that they are of tabular form,

and of a banded structure; that some one or several things are commonly associated with the valuable ores; that they have selvages and slickensides in the fissures and openings, and the like. It is not necessary to enumerate all the features by which they are known. Some of these characteristics are said to be common to all lodes and veins, and others of rare occurrence; but, in general, witnesses will take up one or more of them as essential features of a lode or vein, and declare the fact upon the presence or absence of such elements. A party seeking to prove the existence of a lode or vein will naturally rely on any such characteristic that he can find in the ground in dispute, and call witnesses who will accept that feature as establishing the fact. The party opposed will seek to disprove the proposition advanced against him, and, in addition, to show that all other characteristics of a lode or vein are, in the case under consideration, entirely wanting. In this way, a fierce conflict of testimony is waged as to the existence of one or another distinguishing feature of a lode or vein, and the jury is asked to return a verdict upon the issue thus made. It is apparent, however, that, upon any issue touching the existence of a lode or vein in a place designated a question whether it has one characteristic or another is a part only of the main question, and, in the presence of other unquestioned elements establishing the existence of a lode or vein, an issue of that kind becomes immaterial. To illustrate that matter, it may be said that, with ore in mass and position in the body of a mountain, no other fact is required to prove the existence of a lode of the dimensions of the ore. As far as it prevails, the ore is a lode, whatever its form or structure may be; and it is not at all necessary to decide any question of fissures, contacts, selvages, slickensides, or other marks of distinction, in order to establish its character. As was said in another case in this court: 'A body of mineral or mineral-bearing rock, in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied.' * * * Whether it is in the form of a broken mass of blue and brown lime, between regular walls of the same rocks, or a part of such *strata* in solid formation, mineralized by replacement of some of their constituents with valuable metals, the result is the same, and the name which science may apply to it is of no importance. An impregnation, to the extent to which it may be traced as a body of ore, is as fully within the broad terms of the act of congress as any other form of deposit. In discussions at the bar, and in the opinions of witnesses, it was assumed that the character of a body of ore, as coming within or falling without the act of congress, could be determined by classifying it as a segregated or contact fissure vein, or as a bed or impregnation of ore; and that it was a matter of importance to ascertain whether the ore was separated from the country rock by planes or *strata* of that rock visible to the eye. I see no reason for such distinctions. It is true that a lode must have boundaries, but there seems to be

no reason for saying that they must be such as can be seen. There may be other means of determining their existence and continuance, as by assay and analysis; and, certainly, the form and mode of occurrence of valuable ore, however controlling and influential in determining its geological character, is not a matter upon which it can be excluded from the terms of the act of congress."

There has been a great variety of evidence introduced, bearing more or less upon this issue, taking a wide range in developing, grouping together, and presenting before you numerous facts designed to aid you in forming an intelligent conclusion. Some of these facts and incidents are quite remote or collateral, and some of them are almost impalpable and intangible to the common sense. The topography of the mountain, its geological formation, with its sands, its limes, its porphyry, its quartzite and granite formations, together with the mineralized rock in body and detachment, with photographs of the mountain itself, and of the tunnels and surveys, maps and drawings, have been detailed and laid before you, for your assistance and consideration. All these, both in detail and collectively, bear more or less upon the main issue. They are designed to bring before your view, as far as possible, in the courtroom, the organism of that mountain side, and the inside workings of the mine, to enable you, from your own observation somewhat, to judge of the rock formations of that locality, the stratification of the rocks, and the reasonableness, or otherwise, of the presence and direction of mineral substances and deposits on certain contacts of *strata*, and the likelihood or not of a vein or lode of ore being found and extending among such formations. The expert witnesses for both parties are agreed, in the main, that certain geological formations and *strata*, and substances and fissures, are the usual concomitants and incidents of the presence of the ore vein. So, in tracing out the lay and trend of such ore deposits, the presence or absence of such concomitants is important for the attention of the miner, as they are for the jury in trying this issue.

Gentlemen, it would be an impossible task for the court or you to undertake to reconcile and harmonize the varying statements of all the witnesses who have testified in this case. Such diverse and positively contradictory statements respecting many palpable, tangible facts, susceptible of direct proof, I have not observed, in a long experience in court. Some of the witnesses, unquestionably, have not told the truth; and it is for you to conclude who they are, and whom you will believe. Judging from this trial, there must be something in the altitude of that mountain, or the depths of its mines, wonderfully prolific of falsifiers and orators. From the men of science, versed in geology, mineralogy, and mining engineering, to the most unlettered miner who dwells in the bowels of the mountain, many of them seem to be orators; and, immediately after taking the witness stand, they would be found on the platform, on the same plane as the judge, making a speech to the jury, with all the warmth, energy, and zeal of hired advocates. Some of them were simply partisans, and seemed to have forgotten the office which the law and the obligation of their oath imposed upon them, to speak to the truth of their knowledge, and to tell nothing but the truth. Such exhibitions are to be deplored. They tend to break down the popular respect for the solemnity, dignity, and justice of judicial trials; and, where they obtain, trials are likely to become a mockery, and justice a failure. It will be found, however, gentlemen, in this case, as in the vast majority of trials, that the prominent, controlling facts in the great mass of testimony lie within a small compass. These more conspicuous facts, and a few well-recognized principles, that score to the line of common experience and common sense, you may safely follow as your guide; never for one moment allowing yourselves, in your deliberations, to lose sight of them. This case should, as far as practicable, be stripped of all extraneous matters and mere collateral issues and incidents here and there brought into it, and decided upon the actual

facts, as shown by the weight of evidence to have existed in the mine in controversy at the time this suit was instituted.

There are some collateral facts, bearing upon the question as to whether or not there exists at the point in question what is termed a "quartzite contact with a vein outcrop," which you might consider, possibly, with some profit, and that is, whether or not miners, in their explorations and excavations in the immediate locality in this mountain side, have, as a rule, worked on what was generally recognized as the "quartzite contact," and whether or not these workings, as a general rule, when pursued on a dip, have developed paying ore, as also the extent to which such workings have been prosecuted, as bearing on the fact whether or not a vein exists on that contact. Likewise, you might consider the character, the extent, the general direction, and practical results of the workings prosecuted by the defendants and their lessees in the Champion mine; the quantity of paying ore extracted in a comparatively uniform direction and dip, as also whether or not there was any interruption of the so-called vein at the point of connection where the tunnel or excavation passed out of the side line of the Champion into that of the Battle Mountain; and whether or not the ore at this point of connection is materially different in character from what preceded might also be considered by you, as also why it was that defendants, in extending their tunnel or excavations, pursued a comparatively uniform dip, if they did so, in reaching the point of contact with the Battle Mountain claim.

You have before you, also, the testimony of men who actually dug out these tunnels, as to what they found, saw, and handled there. The testimony of such men is by no means unimportant, if it can be credited. One reason why the men who worked out the ore, and those who from time to time saw it worked out, handled it, marketed and assayed it, should have much weight is that, as shown by some of the evidence, while the ore deposited in places may not have been

over one or two feet in dimensions, the openings excavated to make an accommodating passway might be three or four feet or more, driven apparently through hard rock, little mineralized, if at all, outside of the ore deposit, so that the mere after-comer would see at such points only the hard, barren walls, from which to draw his conclusion in the main. The opinions of experts, under such conditions, are principally valuable, as being based upon, surrounding conditions of rock and substances, as to the reasonableness or probability of the correctness of the statements of the miner as to what he actually found in the way of ore.

You also have before you evidence respecting samples taken from these excavations for your consideration. It is remarkable that there should be such variance in the results of these samples taken, and their assay, as shown by the evidence, on the hypothesis that the men who took them were impartial and honest. With such wide differences, it would indicate that such evidence, at least in this case, is quite unsatisfactory; and it is for you to say, under all the facts and circumstances attending the taking of these samples, as to which of them is more reliable.

There is evidence before you as to the existence of cracks in the overhanging wall, in the Champion workings at certain points; the evident object of such evidence being to create in your mind the probability that the ore deposit found at such points may have come from above, through the lime or porphyry *strata*, and been so deposited where found. In determining whether such be the origin, or whether it be more likely to be a continuation of the vein, as claimed by the defendants, you should take into consideration the condition and character of the ore found at such points, as to whether they bore evidences or not of being oxidized, which is claimed by men of science, experts, to be an inseparable characteristic of ore deposited on this theory of the plaintiffs. In other words, if the ore found at such points as that near to or within

the side lines on the Battle Mountain claim, was hard, sulphide ore, as claimed by defendants, it would be evidence of its formation in place, and of consequence, more probable that it did not come down, through such crack, from the surface.

If you should find the issues for the plaintiff, it will become necessary for you to assess the amount of damages resulting from the trespass. This is the value of the ore taken by the defendants from within the side lines of the Battle Mountain claim prior to the institution of this litigation. On this issue, you have before you the estimates of plaintiffs' witnesses, ranging from $17,598 to $28,200, and $28,799, while the defendants placed it at from $6,000 to $8,000, gross, subject to a deduction of 40 per cent. for the net result. You must determine, between these extremes, which of them most nearly approximates the true value.

It has been insisted by counsel for plaintiffs that, after defendants had knowledge that plaintiffs contested their right to mine within the side lines of plaintiffs' claim, they should have kept the ore there extracted segregated from other ores, so that its exact measurement and valuation could have been more nearly ascertained, and that their failure to do so should be construed most strongly against them. Of course, gentlemen, if you should believe, from the evidence, that this was so,—that defendants thereafter mingled the ore taken from within plaintiffs' side lines with other ore, with the purpose of preventing or obstructing the ascertainment of its quantity and value, or in willful disregard of plaintiffs' rights,—you would be warranted in construing such conduct against the defendants. If, on the other hand, you should believe that defendants, in the honest belief that they were of right pursuing their vein of ore, and without any design to cover up the quantity or value of ore taken, and in the usual mode of handling and marketing such ore, they suffered it to mingle with other ore, or failed to keep it segregated, and that they

have presented here the best evidence obtainable by them, of the result of the ore so excavated and shipped, then you should ascertain the approximate value of the ore as best you can, from all the facts before you bearing upon this issue.

Gentlemen, you are the sole judges of the weight of the evidence and credibility of the witnesses; and, from the close attention you have given to the evidence, and to the arguments of the able counsel engaged herein, I feel such confidence that your intelligence, judgment and impartiality may so far be relied upon to comprehend, analyze, and properly apply the evidence to the law, as to relieve the court from any further review of the evidence.

Verdict for defendants.

[1]Mary A. McCracken v. R. R. Gumbert et al.

(131 Pennslyvania 36; 18 Atl. 1068. Supreme Court. January 6, 1890.)

[2]**Right of way under and over ground. Essential incidents aid construction.** The grantor granted all the coal under his farm, with the "right of way for railroads over the surface at the crossing of ravines," and the privilege to grantees of "running their coal from other lands through the entries and railways made and used in taking out the coal above granted." The grantees owned the coal under the adjoining farm, the two farms being separated by a deep ravine, and the topography of the ground being such that coal from the latter farm could not be transported through the entries under grantor's land, except by connecting such entries with the coal on the other side of the ravine by means of a surface road crossing from the outcrop on one side to the outcrop on the other. *Held*, that the right to bring coal from other land to the entries and railways under grantor's land being incident to the right to transport it over them, and the opening of a way to the surface of grantor's land, and over the ravine, being the only way of getting the coal from the other side, the right to make such way passed with the grant, though the new way may not be used for taking out the coal from grantor's land.

Appeal from court of Common Pleas, Allegheny County.

Action of trespass by Mary Ann McCracken against R. R. Gumbert and William Huey, partners as Gumbert & Huey. Defendants appeal from a judgment entered on a verdict for plaintiff.

M. A. Woodward, for appellants.

John G. Bryant, for appellee.

Williams, J. This case depends on the construction of the grant of Alexander McClure to Farrow, Gumbert & Co. McClure was the owner of a farm containing 244½ acres, and, by

[1]Reported in 18 Atl. 1068 *sub nom. Gumbert* v. *McCracken.*

[2]Grant of land entirely surrounded by other land of grantor, no right of way when the state is the grantor. Nor does private grantor in such case give an underground right of way. *Pearne* v *Coal Creek Co.* 90 Tenn. 619; 18 S. W. 402.

contract made on the 30th day of June, 1859, sold all the coal under said farm to Farrow, Gumbert and Huey, reserving the red coal at the outcrop and six acres of the black coal for the support of the farm buildings and for domestic purposes. With the coal, he conveyed, in express terms, all the rights and privileges of mining, with the right to make drifts, air-holes, and pit-mouths for ventilation and drainage, and the "right of way for railroads over the surface at the crossing of ravines"; also, the privilege of "forever hereafter running their coal from other lands through the entries and railways made and used in taking out the coal above granted." The outcrop of the coal on the McClure farm when mining began was on the face of the ridge fronting the Monongahela river. The seam or vein of coal extended back from the river, under the broken upland, through other tracts in the rear of the McClure farm; one of these being the Pierce tract, the coal under which is also owned by the appellants. The line between the McClure and the Pierce tracts runs along and near the bottom of a deep ravine,—so deep that it cuts through the vein of coal, leaving the outcrop on each side some 15 feet above the bottom of the ravine. Having substantially exhausted the coal under the McClure, the appellants made an opening through the outcrop to the surface, built a road over the surface across the ravine to the outcrop on the Pierce, and commenced to mine their coal under the Pierce, and to run it "through the entries and railways made and used in taking out the coal" from the McClure to the means of shipment on the river side of the ridge. The opening from the entry under the McClure through the outcrop to the surface, and the road across the ravine to the outcrop on the Pierce, constitute the trespass complained of.

On the trial in the court below, the learned judge held that, unless this opening out to the surface, and the road over the ravine, were used in getting the coal out from under the McClure, "the defendants cannot justify their act as lawful

under the privilege conferred by the deed and the agreement mentioned." As there was no pretense that the opening and road across the ravine had been so used, or were built for any such purpose, this was a direction to find for the plaintiff, and is made the basis of the first assignment of error. If we turn to the agreement of 30th June, 1859, it is very clear that both McClure and his vendees knew that the vein of coal that extended through his own land continued beyond it through other lands lying behind his own, and that must be reached by means of the entries and railroads to be made in taking the coal out of his lands. It is a reasonable presumption that they knew that the line between his land and the tract immediately behind it was in a ravine deep enough to cut through the coal, and that it could be transported through the entries under his land only after connecting such entries with the coal on the other side of the ravine by means of a surface road crossing from outcrop to outcrop. With such knowledge of the actual situation on the ground, McClure expressly granted the right of way over ravines, and the privilege of "forever hereafter running other coal from other lands through the entries and railways made and used in taking out the coal hereinabove granted." The construction which the court below put upon this grant wholly defeats it. The ravine was between the McClure and the Pierce tracts, and there could not be continuous mining under the McClure up to the line of the Pierce. The grant is therefore inoperative, according to the construction that prevailed at the trial, because the process of mining under the McClure did not carry the entries and railways up to the line of the Pierce. But the grant is of the right of "running other coal from other lands through the entries and railways made and used in taking out the coal hereinabove granted." The "other coal from other lands" must first be brought to the entries and railways under the McClure, and then it may be transported over them. It can only be brought to them by means of a

connection through the outcrop and over the ravine. This was a fact known at the time the contract was made, and therefore within the contemplation of the parties when the grant was incorporated into it. It is the duty of the court to give such a construction to this grant as shall give it effect. To do this, we must hold that the right to bring the coal from other land to the entries and railways under the McClure is necessarily incident to the right to transport it over them, and that in opening a way from the side entry to the surface and over the ravine to the Pierce, the appellants were not trespassers, but were in the exercise of a clear legal right, under the terms of the grant. This is conclusive of the case as now presented. There is no proof of the conversion by the appellant of any part of the red coal; and the discussion of the appellee's interest therein, as a tenant for life of the surface, becomes unnecessary.

Judgment reversed.

[1]ST. LOUIS MINING & MILLING CO. v. THE MONTANA CO., (Limited).

(9 Montana 288; 23 Pac. 510. Supreme Court. February 4, 1890.)

[2]**Right to order inspection before suit brought. The statute constitutional.** The Montana Statute allowing the Court upon proper proceedings to order the inspection of a mine is not in violation of the Bill of Rights against depriving one of property without due process of law. It is a means of securing the best evidence in a certain class of cases though it may be allowed under the statute before suit brought. Any order oppressive in its nature if made can be corrected by review on certiorari.

The right to inspect was exercised under common law practice and the Court reviews the line of authorities under which orders of inspection have been made in the English and American courts.

Appeal from District Court, Lewis and Clarke County; HUNT, Judge.

CULLEN & SANDERS, for appellant.

WADE, TOOLE & WALLACE, and MCCONNELL & CLAYBERG, for respondent.

BLAKE, C. J. The St. Louis Mining & Milling Company of Montana filed its petition in the District Court of Lewis and Clarke County, and alleged that the petitioner is a corporation under the laws of Montana; that the Montana Company, Limited, is a corporation under the laws of Great Britain;

[1]Affirmed 152 U. S. 160, the Court holding that the statute was not in conflict with the Federal Constitution.

[2]Under the Colorado statute there can be no inspection unless there is a suit pending. *Peo.* v. *De France*, 29 Colo. 309; 68 Pac. 67.

Allowed where defendant's works and plaintiff's works were approaching although no connection. *State* v. *Dist. Court*, 26 Mont. 483; 68 Pac. 861.

The limitations stated, which are necessary to prevent abuse of the Act: *State* v. *Dist. Court*, 26 Mont. 433; 68 Pac. 797. *State* v. *Dist. Court*, 26 Mont. 396; 68 Pac. 570.

that the petitioner is the owner of the St. Louis Quartz Lode Mining Claim, situated in said county; that the Montana Company, Limited, is the owner of the Marble Heart, the Maskelyne, and the Nine Hour Quartz Lode Mining Claims; "that being desirous of, and it being necessary for your said petitioner * * * to have an inspection, examination, and survey made of the premises last aforesaid, in order to enable it to institute its action to recover the possession of the said property, so owned by it, and for the recovery of such damages as it may have sustained by reason of the taking extraction, and conversion of the quartz rock, ore and mineral, taken by the said Montana Company, Limited, from the mining claim and premises, so owned by your petitioner, and for the purposes of enabling it to have such inspection, examination and survey made of its said premises, and of all veins or deposits of mineral bearing quartz rock or earth in place, the apices of which are within the surface boundaries of the St. Louis Mining Claim, * * *" a notice was served upon the Montana Company, Limited, which is made a part of the petition; that the Montana Company, Limited, is in the possession of "certain tunnels, shafts, stopes, winzes, drifts and excavations within the planes of the exterior boundaries of the said Marble Heart, Maskelyne and Nine Hour Lode Mining Claims, extending vertically downward, and beneath the surface of the said claims, and upon veins or deposits of ore, the apices of which are within the exterior boundaries of the St. Louis Quartz Lode Mining Claim" and has been extracting large quantities of ore belonging to the petitioner; that the said tunnels, shafts, stopes, winzes, drifts and excavations of the Montana Company, Limited, connect with the said St. Louis Mining Claim, and are the only means for entering into the same; "that the inspection, examination and survey thereof was and is absolutely requisite and necessary in order to determine the rights of the respective parties, and to ascertain the extent of the trespass, damage, and injury

occasioned by the said wrongful and unlawful acts of the said Montana Company, Limited, in so entering the premises of your petitioner, and extracting the quartz, rock, ore, and mineral from same, and in constructing their said tunnels, shafts, stopes, winzes, drifts and excavations thereon; that for said purpose it was and is necessary that your petitioner, and such persons as may be designated by this court, shall have access to and in the shafts, works and machinery, convenient or necessary to make the inspection, examination and survey aforesaid," of which the Montana Company, Limited, is in the possession.

The prayer of the petitioner is as follows: "Wherefore, your petitioner prays that your honor appoint a time and place for hearing this petition, and that an order for service of notice thereof upon the said Montana Company, Limited, be made; that such proceedings be had and done under section 376, aforesaid, as will secure to your petitioner the rights to which it is entitled in pursuance thereof, and that upon such hearing an order be made for the inspection, examination and survey, so refused to your petitioner, and that the persons appointed by your honor shall have free access to the premises aforesaid."

The notice which is mentioned contained recitals of facts similar to those of the petition, and was a demand for an inspection, examination and survey of the under-ground works of the said lode mining claims of the Montana Company, Limited. The petition was filed November 6, 1889, and the judge ordered that the hearing be had five days thereafter. The Montana Company, Limited, appeared and filed an answer, which denied the allegations of the petitioner.

The court below made an order "that an inspection, examination, and survey of the shafts, tunnels, levels, works and stopes be made as prayed for," continuing twenty days, and designated eight persons to make the same; that "said party shall have the right to pass in and out the mouths of the

tunnels of the defendant without hindrance;" that "said work shall be completed within said twenty days, unless for good cause the court shall order a longer time to be used;" the survey by the said petitioner to be confined within the vertical planes of the end lines of the St. Louis Mining & Milling Company's claim, except so far as it may be necessary to run lines in the tunnels, levels, stopes, drifts or winzes outside of such planes, in order to complete an accurate survey of said workings within the said end lines; " * * * the petitioner's survey to be conducted, so far as possible, without interference with the regular and orderly working and operation of the mine, or the employes of defendant in the discharge of their various duties; and the engineer of the party of petitioner shall not dispose of or sell to any one any plan or section of said mine, or any matter or *data* obtained during or resulting from this survey except to the petitioner, its agents and attorneys. Petitioner's surveyors are not to enter said mine unless accompanied by three representatives appointed by the defendant to accompany them, unless after reasonable notice, not to exceed one hour, such persons shall fail to attend. The persons so hereinbefore authorized to make such survey shall not take or remove from said mine any samples of ore or minerals at any point therein, but they shall be allowed to examine and trace the walls of the vein or fissure, and for this purpose they shall be allowed to use the pick, and remove such material as shall enable them to make such examination."

Afterwards, R. T. Bayliss, the general manager and superintendent of the Montana Company, Limited, and who was in the control of the property which is described in the foregoing order, refused to comply therewith, or permit said persons to make the survey. Upon proper proceedings had in the premises, Bayliss was arrested, and pleaded guilty to the charge of contempt of the court, and was punished by a fine. The Montana Company, Limited, appeals to the court from

the "final judgment and order * * * allowing an inspection, examination and survey of the Marble Heart, Maskelyne and Nine Hour Quartz Lode Mining Claims, * * * duly made and entered in said action * * * in favor of the above-named petitioner, and against this defendant, and from the whole and every part thereof." Upon the application of the Montana Company, Limited, a writ of *certiorari* was issued out of the court to the District Court commanding it to certify fully to this court, and annex to the writ a transcript of the record and proceedings referred to, that the same might be reviewed.

The argument upon this hearing has been restricted to one question. Counsel concede that all the proceedings in the court below have been regular in form, and derive their validity from the following section of the Code of Civil Procedure: "Whenever any person shall have any right to or interest in any lead, lode or mining claim which is in the possession of another person, and it shall be necessary for the ascertainment, enforcement or protection of such right or interest that an inspection, examination, or survey of such mine, lode, or mining claim should be had or made; or, whenever any inspection, examination or survey of such lode or mining claim shall be necessary to protect, ascertain, or enforce the right or interest of any person in another mine, lead, lode, or mining claim, and the person in possession of the same shall refuse, for a period of three days after demand therefor in writing, to allow such inspection, examination, or survey to be had or made, the party so desiring the same may present to the District Court, or a judge thereof, of the county wherein the mine, lead, lode or mining claim is situated, a petition, under oath, setting out his interest in the premises, describing the same; that the premises are in the possession of a party, naming him; the reason why such examination, inspection or survey is necessary; the demand made on the person in possession, so to permit such examination, inspection or survey;

and his refusal so to do. The court or judge shall thereupon appoint a time and place for hearing such petition, and shall order notice thereof to be served upon the adverse party, which notice shall be served at least one day before the day of hearing. On the hearing, either party may read affidavits; and, if the court or judge is satisfied that the facts stated in the petition are true, he shall make an order for an inspection, examination or survey of the lode or mining claim in question, in such manner, at such time, and by such persons as are mentioned in the order. Such persons shall thereupon have free access to such mine, lead, lode or mining claim for the purpose of making such inspection, examination or survey, and any interference with such persons while acting under such order shall be contempt of court. If the order of the court is made while an action is pending between the parties to the order, the costs of obtaining the order shall abide the result of the action; but all costs of making such examination or survey shall be paid by the petitioner." Section 376.

It is contended that this statute is unconstitutional, and authorizes the inspection, examination and survey of the mining property of the Montana Company, Limited, upon the petition of the St. Louis Mining & Milling Company of Montana, and before the commencement of any action by the parties. The obnoxious features are pointed out in the brief, and may be summarized under the following heads: This law may be made an instrument of oppression and injustice. The quality of the interest of the petitioner is not defined. No bond is required to be given to secure the payment of the damages which may result to the owner of the property which is invaded. No appeal is allowed from the order of the court or judge in granting the prayer of the petitioner. The power of the court or judge is vast, and can practically confiscate any mine in the state. The innocent owners of mining property are injured without "due process of law," and arbitrarily deprived of the right of trial by a jury. The

commanding position of the mineral interests of this state, and the importance and extent of this remedy which is applicable to them, demand the careful study of the principles which have been invoked by counsel.

Before we investigate the propositions which have been announced, it will be instructive to ascertain the origin of this provision of the Code, and thereby discover its purpose. The source is unquestionably found in the chancery practice of England, and we must review the cases, which are generally controversies affecting coal-lands. In the *Earl of Lonsdale* v. *Curwen*, 3 Bligh, O. S. 168, an order was made in the year 1799 that the plaintiff and his servants "should be at liberty to inspect the workings of the defendant under the plaintiff's inclosures." It is shown by affidavits that an inspection of the premises was then prevented "because the pipe or air-course which conveyed the pure air had been broken down or taken away, and certain earth, rubbish and other impediments were lying at the ends, roads, or passages leading to the workings." It was thereupon further ordered that "the defendant should cause the obstructions to be removed, and open the air-courses, as the viewers should think necessary for such inspection; and that the viewers, and such other persons as they should appoint, should be at liberty, as often as should be necessary, to make from time to time inspections into the workings of the defendant under the premises of the plaintiff, so as to enable the viewers to make a perfect and complete report of the workings." In *Walker* v. *Fletcher*, Id. 172, the same proceedings were had in the year 1804, and it was also ordered that the defendants should remove certain dams and obstructions in their works as the inspectors should direct, so that the plaintiff might view the pit of the defendants. In *Blakesley* v. *Whieldon*, 1 Hare, 176, the parties entered, in the year 1838, into a contract for the sale of minerals situated on certain tracts of land. Differences arose as to whether the plaintiff should have power to go down into

any of the mines comprised in the contract, or whether the power if granted, should not be confined to the right to descend any pits or shafts sunk on the land over the demised mines. In pursuance of the opinion of the vice-chancellor, a decree was entered, "empowering the plaintiff and his agents, at all reasonable times, and upon reasonable notice, to enter the mines in the pleadings mentioned, and to inspect and measure the same, so far as from time to time may be necessary." The vice-chancellor observed that the evidence proved "that the power of inspection was an unusual reservation in cases like the present." In *Lewis* v. *Marsh*, 8 Hare, 97, a bill was filed by the lessors of a colliery against the lessees, and heard in the high court of chancery in the year of 1849. It appears that "there was no provision for inspection in the lease, and the defendants had worked the coal through a shaft in an adjoining mine belonging to themselves, so that the demised mine could only be entered through the defendant's mine." Counsel "moved that the defendants might be ordered to permit the plaintiffs, and certain persons mentioned in the notice of motion, all or any of them, with workmen and other necessary assistants, at all reasonable times, and from time to time, to have access to the coal-works of the plaintiffs in and through the adjoining coal-works of the defendants, to inspect and examine the said coal-works, the property of the plaintiffs, and to ascertain the real extent, state, and condition thereof, and the real weight of the coal from time to time worked by the defendants therefrom." They submitted that they "were entitled to the means of proving the fact that the defendants had worked beyond their boundary." The defendants opposed the motion, upon the ground that "the plaintiffs might, if they had desired any such power of inspection, have reserved it in their lease; but they had made no such contract. * * * The plaintiffs sought not only to inspect the demised coal-works, but also to pass, for that purpose, into and through the property of the defendants.

No implied contract gave the plaintiffs such a right. Admitting that a power of inspecting their own mine might be impliedly reserved, it must be exercised in a lawful way, at their own expense. The plaintiffs might open a shaft, and descend into the mine, upon their own property; that must be the extent of their legal right under the contract." The vice-chancellor in the opinion says: "I think the case is one in which there is a necessity that the party should be allowed what he asks, in order to prove his case. That is the meaning of necessity. A party cannot get his rights without proving what his rights are; and it is inherent in the case that the plaintiffs should have an opportunity of ascertaining that the defendants do not work more coal than they are entitled to do." The order of the court is similar to that in *Blakesley* v. *Whieldon, supra.* The defendants objected to the admission into their mine of certain persons mentioned in the notice of the motion, and the plaintiffs consented to withdraw them; "and it is ordered that the defendants do permit the said plaintiffs, and the persons so to be appointed, * * * to have access to, and to view and inspect, the said mine and workings; but this order is not to entitle the plaintiffs to view or inspect any part of the defendants' mine except for the purpose of ascertaining the boundary of the plaintiffs' mine."

In *Bennitt* v. *Whitehouse*, 28 Beav. 119, the master of the rolls says, in the opinion: "It is established by the cases that, if a person is making use of his property to the injury of the property of his neighbor, the latter is entitled to an inspection, in order to ascertain the extent of the injury; and this court only requires him to show a *prima facie* case. * * * If it were a question depending only on the balance of testimony, I should, in this case, be in favor of the defendant. But the court requires the best evidence of the fact, and the best evidence here is by an examination of the workings in the defendants' mine. Suppose a man had a right to the surface, and that another person was entitled to the minerals; if the

latter insisted that the former had sunk a shaft, and was obstructing his minerals, would not this court allow an inspection in order that the facts in dispute might be acertained? I have acted upon that principle in *Adshead* v. *Needham*, in which I allowed the plaintiff to go through a gallery in the defendants' mine in order to inspect it. * * * Whenever it appears that a person has power to make use of his land to the injury of another, and there is *prima facie* evidence of his doing so, though it is contradicted, still, as the only way of ascertaining the fact is by an inspection, the court always allows it, if it can be done without injury to the defendant."

In *Bennett* v. *Griffiths*, 30 Law J. Q. B. 98, the judgment of the court was delivered by COCKBURN, C. J., who said: "The power to order an inspection of real or personal property has long existed in the courts of equity, and we find that, as ancillary to that power, the courts of equity have ordered the removal, where necessary, of obstructions to the inspection. In the notes to the *East India Co.* v. *Kynaston*, 3 Bligh, O. S. 153, 168, two cases are referred to in which, under circumstances very similar to the present, such orders were made." The learned judge then cites and approves the cases of *Earl of Lonsdale* v. *Curwen*, *supra*, and *Walker* v. *Fletcher*, *supra*, and adds the following observation: "This latter case, which was decided in the time of Lord ELDON, is a strong assertion of the power to remove obstructions to inspection." See, also, *Whaley* v. *Braucker*, 10 L. T. (N. S.) 155.

The English authorities which have been collated will be considered further, and we will now notice the American cases to which our attention has been invited. The earliest that we have read is *Tornburgh* v. *Savage M. Co.* 7 M. R. 767, which was decided in the year 1867, in the circuit court of the United States of the District of Nevada. The main issue was whether the property claimed by the plaintiff was a separate and distinct quartz lode from the vast mineral vein, which is known as the "Comstock Lode," and a petition was filed

praying for an inspection of the premises. After a full statement of the facts, which it is needless to repeat, Mr. Justice BALDWIN delivered this opinion. "Ought a court of equity in a mining case, when it has been convinced of the importance thereof, for the purposes of the trial, to compel an inspection and survey of the works of the parties, and admittance thereto by means of the appliances in use at the mine? All the analogies of equity jurisprudence favor the affirmative of this proposition. The very great powers with which a court of chancery is clothed were given it to enable it to carry out the administration of nicer and more perfect justice than is attainable in a court of law. That a court of equity, having jurisdiction of the subject-matter of the action, has the power to enforce an order of this kind will not be denied; and the propriety of exercising that power would seem to be clear, indeed, in a case where, without it, the trial would be a silly farce. Take, as an illustration, the case at bar. It is notorious that the facts by which this controversy must be determined cannot be discovered except by an inspection of works in the possession of the defendant, accessible only by means of a deep shaft, and machinery operated by it. It would be a denial of justice, and utterly subversive of the objects for which courts were created, for them to refuse to exert their power for the elucidation of the very truth,—the issue between the parties. Can a court justly decide a cause without knowing the facts; and can it refuse to learn the facts? But one adjudication of this subject can be found in the books, and this is in conformity with the views here expressed. Bainbridge on Mines." (2d Ed. 511, 512.)

The next case in point of time is that of *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Mass. 80, which was heard in the year 1869. Chief Justice CHAPMAN, in the opinion, says: "The plaintiffs complain that the defendants dug a shaft on their own land, near the line of the plaintiffs' land, and thence excavated drifts, extending underground, into the plaintiffs'

land, and took out the ore which they found there. They ask that these drifts may be viewed. The order directs not only that the drifts may be examined by pumping the water out of the shaft, and going into it, and that the drifts may be examined which lead towards the plaintiffs' land, and also those which are under it, but that they may be cleared, so far as may be necessary, in order to ascertain what iron ore or other mineral has been taken from the land of the plaintiffs, and under the surface thereof, and that the viewers may do all acts that may be reasonably necessary to be done to effect the purposes of the decree." The expenses of the explorations amounted to the sum of $4,841.07, and were taxed against the defendants, with the costs. Upon this matter, the opinion says: "But courts of law have power to allow the reasonable expenses of surveys and views in proper cases, and the fee-bill does not apply to the expense of such proceedings. Mines are so situated that special and peculiar proceedings are sometimes necessary in order to attain the reasonable ends of justice in regard to the underground passages by which access to them may be obtained by trespassers."

In the cases of *Thornburgh* v. *Mining Co.*, *supra*, and *Stockbridge Iron Co.* v. *Cone Iron Works*, *supra*, no authorities relating to this discussion are cited in the opinions, and the briefs of the counsel are not reported. In the year 1877, the case of *Thomas Iron Co.* v. *Allentown Mining Co.* 28 N. J. Eq. 77, was determined. An order for the inspection of a certain mine was made upon the *ex parte* application of the complainants, and the defendants insisted that they should have had notice thereof, and an opportunity to be heard. The chancellor says: "In a case like the present, where the application is for the inspection of a worked-out and almost abandoned mine, to ascertain the extent of the workings merely, and it appears that leave has been refused, the granting of the order for inspection is, on the making out of a *prima facie* case entitling the complainant to it, almost a matter of course."

After quoting from *Bennitt* v. *Whitehouse, supra,* and *Lewis* v. *Marsh, supra,* he concludes:

"If the granting of the order for inspection is a matter of course on a *prima facie* case, notwithstanding the sworn denial of the defendant, it would seem that it might, at the discretion of the court, be made without notice to the defendant. It is undoubtedly, however, the better practice to require notice, enjoining, in the mean time, so far as may be necessary to preserve the *status quo.*"

It will be seen that the order of the court below followed an unbroken line of precedents. The rule of equity which has been enforced by the courts of England and America is not of statutory growth. In this state the legislative department has endowed the chancery practice involved in this hearing with the form of law. We are not called upon to decide that the District Courts of the state may make the order complained of, in the absence of any requirement of the Code of Civil Procedure. We can vindicate with absolute certainty the existence of the right to make an order for the inspection and survey of a lode mining claim, where the appropriate steps have been taken by interested parties. The authorities treat the proceedings as the proper mode of securing "the best evidence of which the case in its nature is susceptible." There is not an assertion or suggestion by any jurist that rights of property are impaired or transgressed by the making of the orders for an inspection and survey. For this reason, a bond to indemnify the persons whose property may be inspected is not asked for or required. But in *Bennett* v. *Griffiths, supra,* when authority was given for the destruction of a wall, to enable the viewers to perform their duty, the defendants testified that "it would be injurious to their mines if a gate road was driven through the wall; that the wall which had been erected was only the usual and proper wall, erected for the purpose of strengthening the gate road in that portion of the mine." Under these circumstances, the plaintiff was ordered to give

security to save the defendants from any loss or damage resulting from the inspection.

We have stated that the power of the courts of England over this matter was exercised as a branch of their chancery jurisdiction. In 1854 the common-law procedure act was enacted, and the fifty-eighth section provides that "either party shall be at liberty to apply to the court or a judge for a rule or order for the inspection by the jury or by himself, or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute; and it shall be lawful for the court or a judge, if they or he think fit, to make such rule or order." In the interpretation of this statute, the learned Chief Justice COCKBURN, in *Bennett* v. *Griffiths*, *supra*, said: "The fifty-eighth section of the common-law procedure act does not regulate the jurisdiction given to the courts of law by reference to that already exercised by the courts of equity; but we think that, as ancillary to the power of inspection given to the courts of common law, there is the same power given to remove obstructions, with a view to inspection, which was exercised by the courts of equity as ancillary to their power of ordering inspection."

The section of the code under review does not empower any court or judge to grant an order that is fruitful of injustice or oppression. Whenever this is done, such action will exceed the authority that has been bestowed, and can be rightfully set aside. The bare fact that the St. Louis Mining & Milling Company of Montana petitions for an inspection and survey of the mining property referred to before its complaint has been filed is immaterial. The same object is to be attained at all times, regardless of the commencement of the suit, and that is the best evidence for the trial. In *State* v. *Seymour*, 35 N. J. Law, 53, the court holds that the surveying and mapping of lands by legislative authority is not a taking thereof, and that it is not a trespass to go thereon for these purposes.

In *Winslow* v. *Gifford*, 6 Cush. 327, it is held that an act of the legislature is not unconstitutional which authorized certain parties to enter upon private lands, and make surveys and establish boundaries; and Mr. Justice DEWEY, in the opinion, says: "In effecting such an object, there may be, and often is, a brief, and, as it were, momentary, interference with the absolute right of the owner of real estate. This exercise of power, in its various forms, is one of every day's occurrence; indeed, so common as to be acquiesced in without remonstrance, or even a question as to the right so to do."

This statute does not provide for an appeal from the order, which has been reviewed, and the writ of *certiorari* has been properly issued upon the application of the Montana Company, Limited.

We are of the opinion that the District Court has not exceeded its jurisdiction in determining and granting the petition of the St. Louis Mining & Milling Company of Montana. *It is therefore adjudged that the order and proceedings of the District Court be affirmed, with costs.*

HARWOOD and DEWITT, JJ., concur.

J. S. DOE v. CASPER M. SANGER ET AL.

(83 California 203; 23 Pac. 365. Supreme Court. February 25, 1890.)

[1]**Parallelism of end lines immaterial.** [2]**Right to rectify end lines.** The Silver King was located in 1881 with diverging end lines, but an amended survey was made in 1882 making the end lines parallel followed later by an official survey and application for patent on the amended and proper lines of 1882. *Held:*

1. That the amended survey cured the original defect in the location.

2. That the statute requiring end lines to be parallel is directory merely.

3. That the question of diverging end lines could become material only when they diverge to any considerable extent and the vein is followed on the dip into territory beyond the length of its parallelogram within the extra area gained by the divergence.

4. That the owners had the right to follow their vein on its dip underneath an adjoining claim whether their end lines were parallel or otherwise.

Appeal from Superior Court, San Bernardino County.

[1]*Horswell* v *Ruiz*, 15 M. R. 488.

Parallelism of end lines was not required under the Mining Act of 1866. *Carson City Co.* v. *North Star Co.* 83 Fed. 658.

Locations irregular in form having no parallel end lines cannot claim extralateral rights. *Montana Co.* v. *Clark*, 16 M. R. 80. *Elgin Case*, 15 M. R. 641.

A location may be valid though not laid on the strike of the lode. *Watervale Co.* v. *Leach*, 17 M. R. 568. *Walsh* v. *Mueller*, 16 Mont. 180; 40 Pac. 292.

Extralateral rights of side veins are determined by the end lines. *Walrath* v. *Champion Co.* 63 Fed. 552.

End lines of the claim are end lines of all veins within the claim. *St. Louis Co.* v. *Montana Co.* 104 Fed. 664.

[2]The claimant may reform his end lines and the reformation will relate back to the original location. *Tyler Co.* v. *Last Chance Co.* 71 Fed. 848.

Construction as to apex rights with reference to relocation to avoid surface conflict. *Walrath* v. *Champion Co.* 63 Fed. 552. *Last Chance Co.* v. *Tyler Co.* 61 Fed. 558.

The extreme position of the text case as to the immateriality of parallelism of end lines has not been generally approved. Lindley § 582. Snyder § 638. Mining rights, 11th Ed. 161.

A. F. HATCH and HARRIS & GREGG, for appellants.

CHARLES J. PERKINS, H. C. ROLFE, BYRON WATERS and R. S. MESICK, for respondent.

McFARLAND, J. Plaintiff brought this action to recover damages for the alleged excavating, carrying away, and converting to their own use by defendants of large quantities of silver-bearing ore belonging to plaintiff. The verdict and judgment were for plaintiff, and defendants appeal from the judgment and from an order denying their motion for a new trial.

There is one main question in the case which we will examine first, as the others are of comparatively little importance.

Plaintiff is the owner of a ledge or lode location and mining claim known as the "Oriental." (A portion of this claim was sometimes called "Oriental No. 2," and another portion called "Oriental No. 7"; but, for present purposes, it is sufficient to call the whole the "Oriental".) Adjoining the Oriental, and lying to the north of it, is another ledge or lode location and mining claim owned by defendants, and called the "Silver King." The southerly side line of the Silver King is the northerly side line of the Oriental. (At one stage of the trial there seemed to be a question as to whether or not there was a small vacant strip between the two locations; but that question cuts a very little figure in the case, and we assume at present that the southerly line of the Silver King and the northerly line of the Oriental were identical.) The defendants, in working the Silver King at various depths beneath the surface, drifted across the common line of the two mines, and took out ore within the surface lines of the Oriental, and it was for the value of this ore so taken that this action was brought.

The defendants averred as a defense, and offered evidence

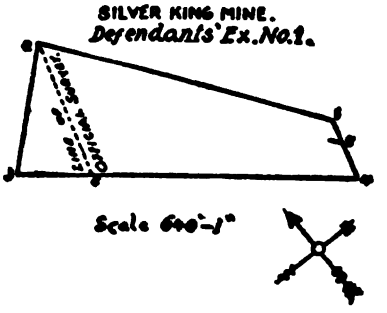
to sustain it, that there is a vein or lode of silver-bearing ore, the top or apex of which is within the surface lines of the Silver King, extended downward vertically; that said vein, in its downward course, departs so far from a perpendicular as to extend outside the vertical southerly side line of the surface location of the Silver King, and to enter under the surface lines of the Oriental; and that whatever ore defendants may have taken within the side line of the Oriental was taken in the exercise of their right to follow the dip of the said vein, the apex of which was within the surface lines of said Silver King. The court below ruled out this defense, and kept it away from the jury, for the reason—and for the sole reason—that in the original location of the Silver King the end lines were not parallel. There is no pretense, as we understand it, that the location was not sufficient, or that it did not comply with mining customs and the laws of congress, in every other respect. Neither is there any claim that the location was of more surface ground than the law allows. As a matter of fact, it was less than 1,500 feet along the ledge, and considerably less than 600 feet in width. And it cannot be contended that the location was of such a shape that the end lines could not be readily distinguished from the side lines. It had only four lines—two longer ones, running with and on either side of the course of the vein, and two shorter ones, running across it. It was evidently intended to be in the usual shape of a quartz location—that is, a rectangular figure, with greater length than breadth; but T. C. Warden, who discovered and located the mine in April, 1881, failed to get the end lines parallel. The divergence from a parallel was about 250 feet; that is, for instance, the southerly end of the westerly end line should have been about 250 feet further east, in order to have been exactly parallel with the easterly end line. Moreover, defendants offered to prove that in March, 1882, less than a year after the original location by Warden, their west end line was "drawn in" so as to make it parallel with the east end line; that since then they were in

the peaceable possession of the mining claim within the lines as they were after said west end line had been so made parallel; that the ore which they took from within the surface lines of the Oriental was part of the vein which had its apex within the surface lines of the Silver King after said west end line had been so made parallel; and that said ore was taken out after the said change of said west end line. The plaintiff objected to the offered evidence, and to any similar evidence, "on the ground that by reason of the surface form and shape of the Silver King claim, as testified to by said Warden, defendants have no rights, under the laws of the United States, or otherwise, to follow the lode in its downward course [beyond] the lines of the Silver King claim, and under the other claims; the end lines of such location testified to by said Warden not being parallel, but divergent." The court sustained the objection, in these words: "The objection to any proof of justification or otherwise, under the location by Mr. Warden, as shown by map No. 1, of defendants to take subterraneous ore from within the vertical side lines of the Oriental No. 2 and the Oriental No. 7 mining claims, extended downward, is sustained." Defendants excepted. And so the court held that the location of the Silver King made by Warden in April, 1881, was totally invalid and void, so far as any right under it is claimed to pursue a vein outside its vertical side lines, because its end lines were not parallel, and that such invalidity was not overcome by the said rectification of the west end line in March, 1882. The same ruling was made at many other stages of the trial, and the only matters submitted to the jury concerned the entry of defendants within the lines of plaintiff's ground, and the amount and value of the ore extracted; and in making these rulings we think that the court below erred.

For another purpose evidence was admitted which showed that at the time—in March, 1882—when the west end line was made parallel with the east end line, as aforesaid, the owners of the Silver King had made application for an official survey

of their mine preparatory to applying for a United States patent; that J. C. Dunlap, a mining engineer and surveyor, at the request of the United States surveyor general, had made such survey, and that finding the end lines not parallel he ran a new west end line, commencing at the northwest corner of the original Warden location, and drawing it in easterly to the original southerly side line so as to make the two end lines parallel, as before stated; that in doing so he kept along and within the original lines, so as to make the surface ground less, and not more, than the original; and that he placed permanent monuments on the new southwest corner, and on the end line. There was also evidence admitted tending to show that from that time the new line run by Dunlap was recognized as the west end line, although there was also some evidence tending to show that some of the owners of the mine were, at first, dissatisfied with that line. But in 1885 an application for a United States patent was made, based on said survey made by Dunlap. None of this evidence, however, was allowed to be considered as a justification of defendant in following their vein outside of their side line. The defendants also offered to amend their answer so as to aver and prove that on July 20, 1887, less than one month after the commencement of this action, defendants made mineral entry and purchase of the Silver King, according to said Dunlap survey in the United States land-office of the district where the claim is situated. This offer was denied by the court.

The following diagram shows the shape of the Silver King surface ground:



The four outside lines are those originally made by Warden. The dotted line shows the alteration of the west end line made by Dunlap, who followed all the other lines made by Warden. The points at which defendants drifted under the Oriental are near the center of the southerly line of the Silver King.

The theory of respondent, upon which the case was tried in the court below, is based on the last line of section 2320 of the Revised Statutes of the United States, which is as follows: "The end lines of each claim shall be parallel with each other"; and his position is that, as the end lines of the Silver King, as originally located, were not parallel, therefore its owners could not follow a vein beyond the vertical side lines of the location. We do not understand respondent to contend that such a location as that of the Silver King is void for all purposes. Indeed, we understand his counsel to admit that it is good for all purposes, except only for the purpose of going underground outside of the surface lines. But—if the question were important here—it would be difficult to logically maintain that distinction. Section 2320, which provides for the parallel end lines, does not give the right to follow a vein beyond the surface lines. It does not provide that if the end lines are parallel the vein may be followed, and if they are not then the vein may not be followed. It deals merely with locations generally—with locations for all purposes. But section 2322, which does give the right to so follow a vein, (and which is little more than a declaration of a previous mining custom), says nothing about parallel lines. If, therefore, the provision of section 2320 about end lines is to receive the strict, literal, narrow, mandatory construction contended for by respondent, it is difficult to see why a location like that of the Silver King is not totally void for all purposes, or for any purpose.

But we do not think such a construction of section 2320 is admissible in any view, or for any purpose. It would include absolute mathematical parallelism, for, if the divergence of a

few feet in a distance of 600 feet would not vitiate a location, why should any reasonable divergence, which does not materially change the figure of the location from that of a parallelogram? The intention of the statute was to make the valuable property rights of lode miners to depend upon things more substantial and important than the mere trick of a perfectly correct measurement of surface ground, or a mathematically accurate survey. A substantial compliance with section 2320 is all that is required. In the *Eureka Case*, 4 Saw. 302, Mr. Justice FIELD says: "In the second place, the provision of the statute of 1872 [the same as section 2320, Rev. St.,] requiring the end lines of each claim to be parallel with each other, is merely directory, and no consequence is attached to a deviation from its direction."

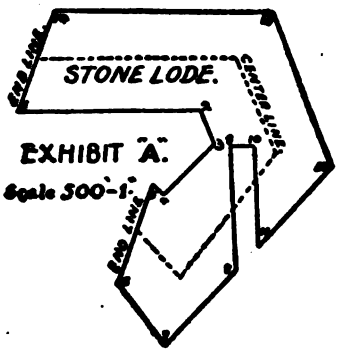
But section 2322, which gives the right to follow veins beyond surface lines, does contain some provisions about that right which are important. By that section a vein can be followed outside of the side lines only, and not outside of the end lines. And so a surface location might be made in such an irregular and many-sided shape as to destroy the right to go beyond the surface lines. That consequence, however, would not be because the end lines were not exactly parallel, but because it would be difficult, if not impossible, to tell which were side lines and which were end lines. In the *Flagstaff Case*, 98 U. S. 467, in *Elgin M. & S. Co.* v. *Iron Silver M. Co.* 14 Fed. 377, and in other decisions, it has been held that the provisions of the federal statutes relating to lode claims were passed with the understanding, founded upon the general practice of miners, that the surface locations of such claims will be made lengthwise along the general direction of the lode or vein in the general form of a parallelogram, with the side lines along the lode, and the end lines across it. But suppose that a surface location should be made, for instance in the shape of an octagon, (and such was nearly the shape of the location in the case reported in 118 U. S. Rep. 196, hereinafter mentioned),

In such a case there would be no end lines and no side lines, and if the locator could go outside his lines in one direction he could do so in eight directions, and encroach upon his neighbors from every point of the compass. If, however, a location is made in substantial compliance with the intent of the statute—that is, where there are two side lines running along the course of the vein, and two shorter end lines running across it, so that the two sets of lines are distinct and apparent,—such a location is not void, but gives the right to follow a vein laterally, although the original end lines may not be exactly parallel, or although they may differ from a true parallel as much as they did in the case of the Silver King. In the case at bar it is not pretended by respondent that the place in the Oriental where the ore in question was taken by appellants was not "between vertical planes drawn downward" through the end lines of the Silver King, and "continued in their own direction," or that such would have been the fact if said end lines had been perfectly parallel, or that he was injured in any way on account of said end lines not being parallel, or that the situation and state of facts between the two claims, so far as this issue involved is concerned, would not have been just the same if said end lines had been exactly parallel. What he contends for is the mere technical advantage of denying appellants' right of working their lode in the usual way on account of the said manner in which the end lines of the Silver King were originally located. His counsel argue as if the right of a quartz or lode miner to follow his vein laterally is a piece of extraordinary legislative grace and favoritism, different from the usual dominion which men have over their property, and therefore to be contracted and circumscribed in every direction by strict construction. But this is a mistaken view of the subject. That which a lode miner locates, that which he seeks to secure, that which constitutes his valuable property in the mine, is the lode itself, and the right to mine it wherever it may go under ground between the end points of his location.

This right was not given, in the first instance, by the act of congress. Of course, as the United States government owned the land, and the right to mine was a mere license from that government, congress might have greatly changed that right, or might have withdrawn the license entirely. But it did not do so. The statutes of congress upon the subject, except so far as they provided for patents, were little more than mere formal legislative declarations of what had before rested in unwritten consent. They followed mainly the customs which miners exercising the license had established among themselves, and which fixed the character and incidents of mining property. And one of the inherent and most valuable qualities of property in a lode mine, as fixed by those customs, was the right to mine the lode to indefinite depths, although it might so far depart from a perpendicular in its downward course as to extend outside the vertical side lines of the surface location.

Counsel for respondent, in support of their main contention, cite the case of *Iron Silver M. Co.* v. *Elgin M. Co.* 118 U. S. Rep. 196. The language of the opinion of the court in that case must be considered with reference to the facts of the case, and the points which were before the court for decision. The question involved was the right of the defendants therein, who were the owners of a lode location called the "Stone Claim," to follow a vein, the apex of which was within the surface lines of said claim, into an adjoining claim owned by plaintiffs, called the "Gilt-Edge Claim." When defendants offered evidence to prove their right to follow their vein into the Gilt-Edge ground, the plaintiffs objected, because, "by reason of the surface form or shape of the Stone claim, its owners had no right" to follow, etc., and because "no part of the Gilt-Edge claim or the mineral or lode within it was within vertical planes drawn downward through the end lines of the Stone claim, and continued indefinitely in their own direction." Pages 202, 203, 118 U. S. The objection there was not that the end lines

of the Stone claim were out of parallel, and as a matter of fact what were claimed to be the end lines were parallel. The objection rested on the general "form or shape" of the Stone surface location, and on the fact that the disputed ore in the Gilt-Edge was not within vertical planes drawn through the end lines of the Stone claim. The objection was very properly sustained, as a glance at the Stone surface location will at once show. The following is a diagram of that location, copied from page 203 of the report:



Here is a surface location with nearly a dozen exterior lines; with no distinguishable side lines or end lines; made in extreme violation of the usages and principles of location recognized by the statutes; and which, if it gave any right to follow a vein at all, would give the right to follow veins in nearly a dozen different directions. The lines which are designated as end lines are not end lines at all. The one designated as the south end line—from the figure 6 to the figure 5—would, if extended, run through the center of the location; and, as stated in the opinion, the ore taken from the Gilt-Edge was not within planes drawn through the asserted end lines. As was said by the learned judge of the Circuit Court who tried the case: "With superficial attention to the letter of the law, and in utter ignorance and disregard of its principles, the two lines were

made in equal length, and parallel with each other, but so arranged that they can never perform the office assigned to them in the law." It is true that in the opinion of the Supreme Court of the United States, rendered in this case, the language of the statute about end lines being parallel is restated; but the meaning of that language, as applied to a case like the one at bar, different entirely in its facts from the one then before the court, was not given, and was not before the court. And it may be noticed that the opinion of the court was delivered by the same learned justice who said in the Eureka case that the said provision was only directory. A comparison of the two diagrams above given, of the Silver King and the Stone, will clearly show the difference between the two, and that the principle upon which the Stone case was decided does not apply at all to the case at bar.

Of course, where end lines diverge to any considerable extent from a perfect parallel they might, when extended in their own direction, include, on one side at least, greater length of ledge outside the side lines than within them; and in such case, if the owner undertook to mine outside ore on or near the diverging end line, some difficulty might arise; and it was, no doubt, the purpose of section 2320 to prevent a party from claiming more outside his lines than within them. But no such question arises in this case.

Moreover, we think that defendants should have been allowed to show, as a part of their defense, that in March, 1882—less than a year after the original location—they rectified their west end line, by means of an official survey, so as to make it parallel with the east line; and that in 1885 they applied for a patent upon that official survey, provided that no injury was done thereby to plaintiff. And it is difficult to see how there could have been any such injury; because by such rectification defendants had less ground within their surface lines, and the vertical end lines extended in their own direction over plaintiff's claim included less of the ledge, than they did

before, although both before and after the rectification they included the place where the disputed ore was taken out. Is it possible that a prospector, discovering a lode mine on a wild and rugged mountain side, and locating it in substantial compliance with mining customs and congressional laws, must inevitably lose what may be the most valuable part of his discovery simply because he failed, in the first instance, to run his end lines on a perfect parallel? Such a locator has the right, and perhaps it is his duty, to make such change as is necessary to parallel his end lines, the next day, or the next month, or within any reasonable time, if such change interferes with the substantial property rights of no other person. Any different rule would be a disgrace to justice, and an impeachment of the common sense of lawmakers.

For the foregoing reasons the judgment must be reversed; and, in looking again over the transcript, we see no other points made by appellants which seem to need special mention, or that will create any difficulty, if there shall be another trial of the case.

The judgment and order are reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.

Hearing in Bank denied.

E. M. GILPIN v. SIERRA NEVADA MINING CO.

(2 Idaho 662; 23 Pac. 547. Supreme Court. - February 28, 1890.)

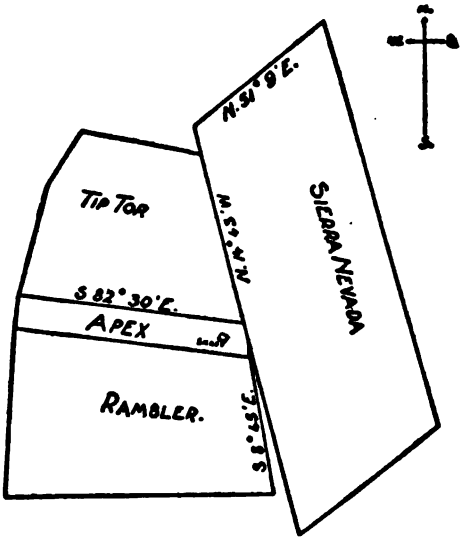
[1]**No extralateral rights to blanket vein.** Defendant owned a claim from which it had worked to the west beyond its side line into plaintiff's claims whose end lines were practically the same as defendant's west side line. The weight of evidence seemed to be that the strike of defendant's vein was at right angles to its side lines: Also that the claim contained a substantially flat or blanket vein which had no apex. *Held* that on such showing defendant should be enjoined from working beyond its west side line.

Appeal from District Court, Shoshone County; SWEET, Judge.

The complaint shows the plaintiff to be the owner, and entitled to the possession, of one compact piece of mining lands in the Yreka mining district, Shoshone County, Idaho Territory, embraced within the outer boundary lines of three contiguous mining claims, called the "Apex," the "Rambler," and the "Tip Top," all constituting the plaintiff's said mining grounds; that while the plaintiff was so in possession, on the 29th of October, 1888, the defendant, a corporation, entered upon such grounds of the plaintiff, and with force, etc., took possession, and unlawfully ejected the plaintiff, and still unlawfully withholds the same from the plaintiff, to his damage of $100,000; that the plaintiff's said claim is upon a mineral zone or belt containing gold, silver and other precious metals; that previous to such ouster the plaintiff had been working and mining the three locations named as above, as one mining claim, continuously since the 3d day of November, 1887; that the defendant owns a mining claim adjoining on the east of these several claims of the plaintiff, so constituting one claim, the defendant's claim being called the "Sierra Nevada"; that

[1]*Duggan* v. *Davey*, 17 M. R. 59.

the western side line of the Sierra Nevada is coincident with eastern end boundary line of said Tip Top claim, and also with the eastern end line of the Apex claim, and nearly coincident with the eastern end line of the Rambler claim. The relation of the properties of the parties is shown by the following diagram:



The plaintiff further claims, in substance, that the plaintiff's middle claim, the Apex, is upon and along said mineral zone or belt; that the mineral-bearing rock in place is a part of such zone, and crops to the surface in and upon the Apex location, the true apex of the zone or belt being within the exterior boundaries of the Apex claim; also, that the zone or belt is of greater width than the Apex claim, and extends on either side of the Apex, and is covered by the Rambler and Tip Top locations. The plaintiff also claims, and the fact is admitted by the defendant both in its cross-complaint and in argument, that the defendant, prior to the commencement of this action, has been working the Sierra Nevada claim, and from the under-

ground tunnels in the Sierra Nevada claim has extended its works and tunnels, beyond its western side line, into and upon the grounds claimed by the plaintiff, and maintains his possession thereof against the plaintiff, and has been and is extracting and carrying away ore therefrom, and is, as the plaintiff avers, preventing the plaintiff from working his mines within his own mining grounds; that such acts are waste, and irreparable damage to the plaintiff's property; to recover which property, with other purposes, this action is instituted; that the defendant is a foreign corporation, and insolvent; and prays that pending this litigation a temporary injunction be granted, etc. The allegations of the complaint are made positively, as of the plaintiff's own knowledge, and the same are verified in the same manner.

The answer is upon information and belief, and is so verified. It admits that the defendant is a foreign corporation. Except this admission, it denies every other material allegation of the complaint, and prays that the complaint be dismissed. The defendant also files his cross-bill, and prays affirmative relief; and for such purposes makes this plaintiff, Larry O'Neill, A. D. Bevin, David Le Ban, A. M. Baldwin, Edward Leonard, W. T. Malony, William Rogers, C. J. McMillen, B. F. Bates, and W. B. Heyburn, parties defendant, and avers: (1) The corporate character of the cross complainant. (2) That on the 6th of April, 1886, the lands of the Sierra Nevada claim were public domain, and unoccupied mineral lands, and on that day were duly claimed, by parties named, as a mining claim, under that name; that said locators, with others who had become interested in the Sierra Nevada claim, on June 3, 1886, "having discovered the true strike, and course of said vein," filed an amended location of said claim, as it now appears on the diagram heretofore given; that the cross-complainant became the owner of such amended location and claim on the 15th of November, 1886, and is still such owner, and in possession of the same, and has expended $100,000 in

improvements thereon, in tunnels run in and upon said vein, cross-cuts, shafts,, etc. and is still in possession of all such tunnels, etc. (3) "That, while said E. M. Gilpin claims to be the owner in his own right of said Apex mining claim, as a matter of fact, each and all of the parties hereto, to-wit [the other defendants in this cross-complaint named,] are the owners of undivided interests therein as tenants in common with the said E. M. Gilpin," and the claim of said Gilpin to be the sole owner is untrue; wherefore said parties are joined as defendants herein in order that "their claims, together with the claim of the said E. M. Gilpin, may be fully and finally determined, adjudicated, and settled"; that said defendants "actually claim an interest unknown to the cross-complainant in and to the premises hereinbefore described, and in and to the vein thereon, which is the Sierra Nevada lode mining claim and vein"; and, that such claim may also be settled, it is necessary that all of said defendants be made parties. (4) That all of the defendants are insolvent, and are pretended owners of a mining claim described in the complaint of the plaintiff, Gilpin, as the Apex, Rambler, and Tip Top mining claims, and, as such alleged owners, have by their underground workings entered upon the Sierra Nevada claim, and by shafts, etc., have gone down and broken into the works of the cross-complainant, "made by its following its said vein, upon the dip thereof, into the ground," and threaten to take and hold possession, etc., of said workings so broken into, and are engaged in under-ground works with that intent. (5) That the locations of the Apex, Rambler, and Tip Top are in fact void and of no effect, because they were made, or attempted to be made, within the line of the Sierra Nevada, etc. and that, if the defendants be allowed to carry out their designs, the cross-complainant will sustain irreparable damages. (6) And prays that the defendants named, except said Gilpin, be brought in as defendants; that all such defendants be decreed to have no right to any of the ground in controversy;

that pending this suit the defendants be enjoined from entering upon, etc., any of the grounds in dispute, and upon the determination of the action the injunction be made perpetual.

A large amount of evidence was taken upon the issues so made up, and upon the 5th day of February, 1890, his honor, Judge SWEET, by order, denied the injunction. From that order an appeal is taken by the plaintiff to this court.

W. B. HEYBURN and W. W. WOODS, for appellant.

WM. H. CLAGETT and ALBERT HAGAN, for respondent.

BERRY, J., (*after stating the facts as above.*) There are three principal points in this case: (1) Is the plaintiff the owner of the mining grounds claimed by him, so as to be entitled to invoke the aid of this court to prevent the acts complained of? (2) Is the injury alleged of such a character as to warrant the exercise of the equity power of the court? And (3) is such injury, in fact, threatened or being done?

As to the question of non-joinder of parties plaintiff, that is not properly in issue on an application for an injunction against the acts of a stranger to the property threatened with injury. A party may intervene to protect by injunction his own interests, as well as the interests of his co-tenants. But, if this were otherwise, the deeds to plaintiff introduced in evidence on the hearing cover all the interests of each of those persons in each of the three claims alleged by the plaintiff to belong to him, except said W. B. Heyburn, who is not shown to have any interest in either of said claims; and from the evidence there appears to be no ground for such claim.

We may first inquire, then, as to whether the plaintiff has shown sufficient to give him a standing in court. This case seems to have been tried, in part at least, upon the theory and tacit understanding that *prima facie* proof of the plaintiff's title was all, on the question of location, that need be shown in such a case as this. After some evidence had been put in by

the plaintiff tending to show the validity of his location of the Apex claim the court asked: "Are you gentlemen going into matters showing everything which goes to show a valid location? Plaintiff's counsel. We do not want to. Defendant's Counsel. We do not, either. Plaintiff's Counsel. We just propose to make a *prima facie* case,"—and passed immediately from the subject of the Apex location (which to that point had been the subject of the evidence) to the location of the Rambler. This may not be considered as a stipulation releasing the plaintiff from the obligation to introduce further evidence on the location of the Apex, or that the evidence already in made a *prima facie* case of location; but it seems to express the mutual understanding between the court and the counsel on either side as to the theory and rule of law on which the case was to be heard and determined, and may well have had an effect in restricting the amount of evidence which either side might deem necessary after making a *prima facie* case. It is not to be presumed that the defendant, on a preliminary motion, and especially under such circumstances, would introduce all the evidence he would on the trial. From a review of the plaintiff's evidence up to the close of the examination of John Gill this theory was evidently relied on; but afterwards, however, the plaintiff returned to the subject of the location of the Apex, introduced Michael Gibbons, John M. Burk, W. Clayton Miller, J. M. Porter, C. D. Porter, and other witnesses as to the facts of locations, as to the character of the ledge claimed in the Apex, its outcrop within the Apex lines, the character of the material as to ore, its appearance or non-appearance in the shaft sunk from the surface of the Apex, the dip of the underground veins, and the relation of the ledge claimed for the Apex with the defendant's drifts beyond the west side line of the Sierra Nevada, and on other points. Much of this evidence was controverted by the witnesses of the defendant, and some of it was corroborated; but, on the whole, the weight of the testimony seems to be in favor of

the validity of the plaintiff's locations. He certainly makes a strong *prima facie* case, covering his surface locations, and, of course, to the vein in the Apex, whatever it may be, and wherever it may run or dip. The defendant, in its brief, says: "The plaintiff should establish his title to the surface ground under which he claims, which, to say the least, is very doubtful upon the showing." This is the defendant's view after the evidence is all in. It must be noted that the plaintiff is in possession of his claim, and the presumption is that his possession is lawful, and the burden is on the defendant to repel such presumption, and also that one object of this action is to settle the question of that right. In the cross-bill the defendant demands that it shall be settled. The action of the judge, or of either of the judges, before whom this motion has been considered, did not affect, or tend to affect, that settlement. The judges had no authority to do that. The fact of the plaintiff's compliance with the law, or his non-compliance, is a question of fact only, to be determined on the trial of the case. If, then, after all this preliminary proof on both sides is in, the question is pronounced by the defendant as "doubtful upon the showing," the *status* of the plaintiff as a proper party to demand the preservation of the property he is contending for is practically conceded. But without such concession the law insures such right to the plaintiff.

We may then inquire as to the character of the injury alleged. By section 4288, Rev. St. Idaho, subds. 1-3, it is provided that an injunction may be granted "(1) when it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;" and "(2) when it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, great or irreparable injury to the plaintiff; (3) when it appears during litigation that the defendant is do-

ing * * * some act, in violation of the plaintiff's rights, respecting the subject of the action, and [having a] tendency to render the judgment ineffectual." The statute seems to be framed to meet the case of such an injury as is here complained of. The subject-matter of the litigation is a mine, which is valuable only for the mineral it contains. To remove that mineral is certainly waste, and waste is one ground for the issuance of this writ. It is also great injury; and that is another ground, whether it be reparable or not. Irreparable injury is still another ground, disjoined in the statute from the other grounds. To remove the ore from the mine, and leave but a worthless shell to be contended for, would certainly have a "tendency to render ineffectual" any judgment which the plaintiff might recover. Conceding the plaintiff's rights to his mining claim and to the ledge to be as stated in the complaint, it cannot be argued that continuing to remove the ore from the mine is not waste of the property, nor that such acts do not constitute great damage, nor that to do so does not tend to render a judgment in his favor ineffectual. The chief argument of the defendant is that the defendant is solvent, and abundantly able to pay any damages which may be found against it. But even on this point the case is against the defendant. The complaint states that the defendant is a foreign corporation. That is admitted. Also, positively, that it is insolvent. That is only denied on information and belief. There was no evidence given on the subject at the hearing. Hence that allegation of a fact in the case, except for the purposes of pleading only, must be taken as unanswered. On the whole, upon this point, it may well be questioned whether the plaintiff has not fully shown that the injury, if consummated, will be irreparable. But, whether it be fully shown or not, the other statutory grounds, as we have seen, are sufficient to authorize him to claim an injunction.

We may then turn to the main and last consideration in this case, and inquire whether the evidence taken shows that the

injury complained of is in fact being done. We have before said that, *prima facie*, a miner is confined within the boundary lines of his claim. Section 2322, Rev. St. U. S., provides, among other things, that the owner of a mining claim "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." The claim of the defendant is that the veins of ore on which the defendant admits it is working are veins, the top or apex of which lies inside of the side lines of the Sierra Nevada claim. On the other hand, the plaintiff avers that the apex of such veins is not within the side lines of the Sierra Nevada claim, and hence that the defendant has no right to follow it within the plaintiff's lines. His theory is that the true apex of the lode is in his Apex claim, and that its strike is nearly at right angles with the western side line of the Sierra Nevada claim, and that the dip of the vein matter is more to the south than is claimed by the defendant. But the plaintiff also urges that, wherever the apex of this vein may be, or if it have no apex at all, but is simply a blanket vein, if its apex be not between the defendant's side lines, the defendant has no right to follow it into the plaintiff's grounds, or within the boundaries of the claims of which the plaintiff is in possession. This is a proper construction of the law. The defendant's right to that ore, if he have such right, must be based solely upon the fact that the vein has its apex within its own side lines. The difficulty in determining this matter is greatly increased by the fact that no upraises upon the vein are shown to have been made by the defendant to determine its apex, or to show its dip or trend. No shafts have been sunk on any of the ground in question, except it be the shaft in the Apex claim, which penetrated the work-

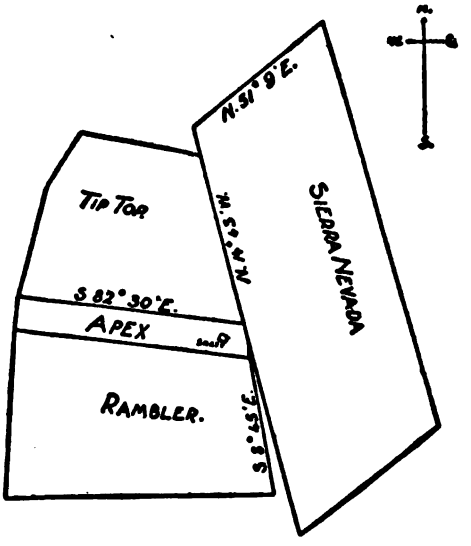
ings of the defendant. Considerable evidence has been produced, mostly (unless we except the evidence of the Apex shaft and diagrams and plats of defendant's workings) of a speculative character. There is in that evidence much conflict on material points. But, considering all of the witnesses of equal credibility, the circumstances under which their knowledge was obtained, and the probabilities of their correct understanding of the facts, throws light upon many of these apparent discrepancies; and the actual measurements and plats of skillful engineers show controlling facts, in view of which the oral evidence must be understood, and erroneous theories must be corrected. The courses of the surface lines of these several claims require careful attention. The fact that the Sierra Nevada claim has been relocated and swung around from its original location has little or no bearing upon what is here the main question. We are to consider the claim as it now is.

It is proved beyond a question that the plaintiff sunk a shaft from about midway between the side lines of the Apex claim, and near the eastern end line, in what is described as "ledge matter," consisting of quartzite, talc, and some ore, at a considerable deflection to the south from a vertical line, following the dip of this so-called "ledge matter" in its several variations, but always inclining to the south, a distance of about 150 feet, and was led thereby upon and into the underground workings of the defendant; that such shaft, in its descent, when the defendant's work was struck, had passed beyond the side line of the Apex claim, a considerable distance into the Rambler grounds; that in the descent the plaintiff found some ore before reaching the defendant's works, and had put some in sacks before reaching the lagging over the defendant's tunnel. This so-called "ledge matter" is testified to as continuous. It is worthy of note that the ore which the defendant was tunneling and stoping out was, in character, carbonate and galena. "Witness Gibbons. Question. State from your observation as to the quality of the ore. Answer. It was

carbonate, I said." This does not seem to be controverted, and the fact may bear upon the question of apex or dip; for it is a matter of common knowledge that carbonate ores are sometimes found in blanket veins without apices or dips. The extraordinary width of this mineral belt or zone—extending, as all concede, often to many hundreds of feet—is unusual, and hardly conceivable in a fissure vein; also its position, almost horizontal, at least in the claims in question. All, taken together, may raise strong doubts, in the absence of actual demonstration, of its being in its main breadth a fissure vein at all. If that were so, it would be an end to the controversy between the parties, and the injunction should, of course, issue. But the case is presented as concerning a fissure vein only, with the usual apices and dips; and so we must consider it, by the light given us by the evidence. In examining the maps and diagrams in the case, our attention is at once called to the fact, from the map of the defendant (Exhibit X), that the mean dip of the vein in the grounds claimed by the plaintiff, corresponding, also, mainly to the evidence of the witness, is south, 5 degrees west. The north side line of the Apex claim runs south, 82 degrees 30 minutes east. Hence such dip is only 2½ degrees east of a right angle with that side line of the Apex claim, or nearly at right angles with it. The lead of the vein as claimed by the defendant on that map seems by inspection to be about north, from 5 to 10 degrees east; so that the average dip, as the defendant claims it, would deflect from the lead of the Sierra Nevada ledge something less than 5 degrees—possibly not at all. It was stated on the argument, and not controverted, and as we think the rule is, that the true average dip of a vein is always at right angles to the lead; and, if the veins so being worked by the defendant are really dips from the Sierra Nevada claim or lead, it is difficult to harmonize these principles and facts. But they do all harmonize with the claim and theory of the plaintiff. To comply with the defendant's theory, the average true dip should be west,

and perhaps some degrees north of west, or at least 90 degrees from what it is shown to be on the map, and also as stated by the witnesses.

The following diagram, drawn from the exhibits, mostly of the defendant, will tend still further to illustrate the facts in the case:



Tunnel A is a working tunnel, and some distance below the plane of the mineral and of the tunnels upon the ore. All the tunnels, B, C, D, E, are claimed by the defendant to enter on the outcrop of the ledge; but the elevations marked on Exhibit X show that such outcrop is not an apex or crest of a vein dipping laterally from it, but that it is an outcrop on the mountain side of a mineral deposit, nearly horizontal in position, but rising slightly as it recedes into the hill, and at right angles with a line formed by the mouths of these tunnels. All these tunnels run on the foot wall, or rather on the bedrock or floor of the ore deposits. Here there can be no dispute as to the respective elevations of the mineral at the points named. The elevation

of the bottom of the mouth of tunnel B is 3,415 feet. At its face, in the Rambler claim, it is 3,419 feet—a rise of 4 feet. The elevation at the mouth of tunnel C, distant from B about 150 feet, is 3,438 feet. At a point a little over 200 feet west, where the measurement was taken, its elevation is 3,441 feet—a rise of 3 feet. Tunnel D, at its mouth, is 3,449 feet. At about 150 feet west, its elevation is 3,454 feet,— a rise of 5 feet. At a point near the southeast corner of the Apex claim, it falls to 3,448 feet—a depression of 1 foot below its mouth, about 250 feet distant. The elevation of tunnel E at its mouth is 3,469 feet. In about 100 feet it descends to 3,467 feet, and in about 60 feet further rises to 3,472, or to a plane 3 feet above its mouth. It is admitted on the argument that the water from these workings of the defendant flows out at the mouths of these tunnels. When we consider that these tunnels are practically almost parallel with each other, and running nearly west, it seems impossible to conclude that these deposits of ores in any way dip from anything yet shown in the Nevada claim. They all rise upward from the entire Sierra Nevada system, whatever its formation may be.

But, further considering the tunnel developments, there is not one of them that does not leave the line of the Sierra Nevada outcrop, practically, at right angles to it—each, as testified by the defendant's witnesses, upon a vein of mineral, and pursuing an almost due westerly course; tunnel B, at least, running over 600 feet—and all ending among the stopes, uniting these tunnels at their westerly ends. Not one tunnel indicates a lead in the direction of what the defendant claims as the apex of its mining claim; but all of them do indicate an extension of the mineral belt or zone westerly, at almost right angles from the defendant's outcrops, longitudinally with the side lines of plaintiff's claims, through and westerly of the point reached by the plaintiff's shaft, from what is called the "discovery point" of the Apex claim, the bed-rock or floor of the whole system rising slightly from the outcrop on the

Sierra Nevada as the system, zone, or mineral belt and the defendant's tunnels reach to the westward. Another fact, heretofore mentioned, has proof positive in the several elevations of these tunnels, namely, that the dip of the floor of this mineral belt or zone is from north to south. The elevation at the mouth of tunnel B is 3,415 feet. One hundred and fifty feet northerly, at the mouth of C, the rise is 23 feet. At D, 125 feet farther, the rise is 11 feet. From D to C, 100 feet farther north, it is 20 feet. So that the rise from B to C—a distance, by inspection of the map, of about 375 feet—crossing this mineral belt, is 54 feet; and as far west as these tunnels go along this belt the same relations in the elevations of the southern portions seem to be maintained. This also corroborates the evidence of some of the witnesses, and is consistent with plaintiff's claim.

From these and other like facts, it seems to us as plain that defendant shows no reason whatever to justify it in extending its works, and extracting the ore in this mineral ground west of its own side line of the Sierra Nevada claim, and within the boundary lines of the plaintiff's mining claim. The order denying the injunction should be overruled, and a temporary injunction should issue, as prayed in the complaint. It is so ordered.

BEATTY, C. J., (*specially concurring.*) Upon the record we have in this matter, were it a hearing upon the merits, I would hesitate to agree to a reversal; for, from the examinations I have been able to make of the testimony, I think its weight seems to be with the defendant. This, however, is not to settle the title of the ground in controversy, but only to preserve its value until that title can be settled upon full hearing. Admitting the defendant is right, the inconvenience to it from an injunction will be less than would be the damage to plaintiff should he prove to be right. Always, in questions of injunction on the working of mines, the doubt should be

resolved in favor of granting the writ. There is evidence for and against plaintiff's claim of a ledge in his Apex ground, and in the shaft therein; but the undisputed fact, which with me is almost controlling, is that the various workings of the Sierra Nevada show a nearly flat vein, with a much more decided dip to the south than to the west, which so far sustains plaintiff's theory that the vein runs easterly and westerly, instead of mere northerly and southerly, as defendant claims. At the same time it must be admitted that, from all the facts before us, the general course of the great principal vein through the country, for miles, is as defendant holds. Whether that dip to the south may be from some dislocation of the ledge, from neighboring dikes, or other causes,—may be a part of another cross-ledge,—I do not undertake to answer. The simple fact is, it is there; and, until clearly explained as only the result of some dislocation of the ledge, and not its true dip, I think plaintiff should be protected. I do not agree to any suggestion that these workings are a part of a wide vein, on the zone theory. While it may so prove, I do not think the facts before us so show; and I will not indulge in any theory. My concurrence in reversing the order refusing the plaintiff an injunction is based alone upon the reasons I have here stated.

SWEET, J., filed a dissenting opinion, 2 Idaho p. 675; 23 Pac. 1014, consisting practically of his views on the character of the formation and what the evidence showed as to the strike of the Sierra Nevada vein.

NOTE.—This case was afterwards compromised. The Sierra Nevada ore body is part of the same vein litigated in *Empire State Co.* v. *Bunker Hill Co.* 114 Fed. 417, lying on the westerly end of the Viola and San Carlos Lodes, platted in the report of that case; but the vein as developed in the Sierra Nevada was broken down and showed abnormal conditions.

W. B. HEYBURN,

Wallace, Ida. Oct. 29, 1902.

[1]J. M. BURKE ET AL. V. SCOTT MCDONALD ET AL.

(2 Idaho 646; 33 Pac. 49. Supreme Court. February 28, 1890.)

[2]**Neither pay ore nor walls are required to be shown** in the discovery, but there must be a visible vein disclosed by the presence of ledge matter distinguishable from the country rock.

[3]**A miner leaving a discovery half located** to prospect for and stake other claims cannot rightfully ask the forbearance of other prospectors seeking to locate the first discovery claim.

[4]**Claim staked too long or too wide.** An excessive enclosure within the lines may avoid the entire claim, but this will not be extended to slight excess attributable to the difficult character of the ground. The claim in this instance held valid with statement that no exact figures or uniform rule can be laid down to cover all such cases.

The allegation that plaintiffs filed their adverse in the land office not being denied by the answer becomes a fact admitted by the pleadings.

[5]**But the citizenship of the adverse claimant** is an averment to be affirmatively proved, whether denied or not.

[6]**The verdict** in suit supporting adverse claim must be specific, that the party is not only entitled to the possession, but that he is so entitled by compliance with the law. This is essential to comply with the provision for the instance where neither party may have complied with the mineral law.

The refusal to submit special issues is reversible error where such issues were properly requested in a complicated case.

Appeal from District Court, Shoshone County; WEIR, Judge. Action by J. M. Burke and others against Scott McDonald and others to determine title to a certain mining claim. There was a judgment for plaintiffs, and defendants appeal. Reversed.

[1]S. C. on former appeal, 29 Pac. 98.

[2]*Cons. Wyoming Co.* v. *Champion Co.* 63 Fed. 540.

[3]*Lockhart* v. *Wills*, 9 N. Mex. 344; 54 Pac. 336.

[4]*Richmond Co.* v. *Rose*, 114 U. S. 576. *Hanson* v. *Fletcher*, 10 Utah 266; 37 Pac. 480. *Gohres* v. *Illinois Co.* 40 Ore. 516; 67 Pac. 666.

A gross excess or an excess so great that the stakes cannot be found within several hundred feet avoids the claim. *Leggatt* v. *Stewart*, 15 M. R. 358. *Ledoux* v. *Forester*, 94 Fed. 600.

[5]*Contra, O'Reilly* v. *Campbell*, 116 U. S. 420; cited Mining Rights 11th Ed. 283.

[6]See Note 2 to *Bennett* v. *Harkrader*, 18 M. R.—.

WM. H. CLAGETT, F. GANAHL and ALBERT HAGAN, for appellants.

WOODS & HEYBURN, for respondents.

BEATTY, C. J. The appellants, as claimants of the Lackawanna lode mining claim, situated in Yreka mining district, Shoshone County, Idaho, filed in the local land office their application for patent therefor, to which the respondents, as claimants of the Mammoth claim, within the time required by law, filed in said land office their adverse claim, and commenced this action in the district court in said county.

Upon the trial of the cause before a jury, a general verdict was found in respondents' favor, upon which a judgment being rendered, the appellants moved for a new trial, and, from the order of the court overruling such motion, they have appealed to this court. Whatever the value of the property in controversy may be, the cause having been so ably and fully presented by eminent counsel, merits careful consideration. This has been given it, so far as the brief time between its submission and the necessarily early adjournment of the court permits. Our attention has been directed to the numerous propositions involving questions of both law and fact, of not all of which we will attempt a consideration.

Appellants earnestly urge that no vein was discovered in the Mammoth prior to its location or that of the Lackawanna. The difficulty is not so much ignorance of the law's demand, or of what constitutes a vein under it, as its willful violation. The practice of posting notices upon any ground within which the existence of a ledge may be imagined has become so common that the emphatic requirement of the law, that a ledge discovery must initiate the location of a claim, is nearly forgotten. The courts will insist upon and enforce this most important provision of the law whenever oppor-

tunity offers. It must be remembered that every seam or crevice in the rock, even though filled with clay, earth, or rock, does not constitute a vein, nor every ridge of stained rocks, its cropping. Nor, on the contrary, is it required that well-defined walls shall be developed, or paying ore found within them. But something must be found in place, as rock, clay, or earth, so colored, stained, changed, and decomposed by the mineral elements as to mark and distinguish it from the inclosing country. While the contents of ore-bearing veins widely differ, there is that indescribable peculiarity in the "ledge matter," the matrix of all ledges, by which the experienced miner easily recognizes his ledge when discovered. The evidence in this case does not clearly show such discovery of a vein in the Mammoth as the law requires.

It is also claimed by appellants that if the locators of the Mammoth did post their notice on September 17, 1885, as claimed, they, before marking its boundaries, left it, to prospect for and locate other claims, and before their return, the Lackawanna was located on the following day, and, as an evidence of the irregularity of their locations, I refer to the fact that in four days, commencing on September 16th, Smith, Catline, and Flaherty located fifteen claims. The law does, in its liberality, allow the prospector, after the discovery of his vein, a reasonable time in which to develop its course, and then mark accordingly the boundaries of his claim; but it does not permit him, after having posted his notice, to leave his claim incomplete, and, going in quest of other claims, post his notice here and there over the country to the exclusion of other prospectors, and at his leisure prospect and mark out his claims. While no hardship or unusual exertion is required of him, good faith and reasonable diligence are. So long as he exercises the latter, the courts will shield him, but not in the commission of any fraud upon the law. If in this case the evidence clearly showed as true what appellants claim, this court would place its seal of

condemnation upon the Mammoth location. But these questions above referred to, with that concerning the performance of the annual assessment work on said claim, were submitted, under the instructions of the court, to a jury, composed in part, at least, of miners, and, in view of the conflicting testimony on these questions this court would not be justified in disturbing their conclusion.

Were the boundaries of the Mammoth so large as to render the location void? Easterly of the discovery point it was marked about 150 feet longer than the calls of the notice, and was considerably wider than allowed by law, while the westerly 1,000 feet was marked substantially correct in size. Strict accuracy in the marking of claims cannot be expected or required. The character of the ground over which the locator must make his measurements must be considered; if even, with unobstructed view, greater accuracy would be required than when the surface is broken, and covered with timber. If a claim is made excessive in size with fraudulent intent, it is void. If made so large that it cannot be deemed the result of an innocent error, fraud will be presumed, or if from any cause it be made so large and with such indistinct markings that its boundaries cannot be readily traced, and subsequent locators after reasonable diligence cannot find the same, it would be void, as against another location made in good faith. Just what excess will be tolerated, or what will vitiate, cannot be defined, but must depend somewhat upon the circumstances of each case. In Montana, it has been held that a claim located 1,763 feet long is void, and the tendency there is toward strict accuracy of boundary; while in other courts it has been held that in the absence of fraud the claim will be held void only as to the excess. *Stemwinder Case*, 2 Ida. 421; 21 Pac. 1040; *Mining Co.* v. *Rose*, 114 U. S. 579; 5 Sup. Ct. 1055; *Jupiter Co.* v. *Bodie Co.* 11 Fed. 675. In this case it appears the ground is such that accuracy in measurement could not be

expected; also that the Lackawanna was discovered and located mostly on the westerly end of the Mammoth, where the latter was correctly marked. It cannot be presumed, from all the circumstances of the case, the Lackawanna locators were misled by these markings, and the conclusion of the trial court is sustained.

The respondents having alleged in their complaint the filing by them in the land office of their adverse claim, appellants insist such filing must be proven, though not denied by them, and rely upon *Rosenthal* v. *Ives*, 2 Ida. 244; 12 Pac. 904, decided in this court, and *Mattingly* v. *Lewisohn*, (Mont.) 19 Pac. 310. The latter holds it a necessary allegation, but does not say it must be proven when not denied. In the former, this court held citizenship must be alleged, proven, and found, even though not denied. But why did it so hold? The reason is evident. Citizenship is an absolute qualification to the holding of mineral land. The government grants its lands only to its citizens. Before it will issue its patent to any one, it must know positively that he is a citizen; hence the necessity of showing by the judgment of the court the citizenship of the applicant. Whether the plaintiff files or proves the filing of his adverse claim in the land office is a matter of no interest or consequence to the government. That is simply a question of practice which it provides for the protection of the interests of the adverse parties, and which they may waive, if they desire. The appellants, not denying the allegation, waived their right of its proof by respondents, and the latter are clearly justified by section 4217 of our statute in not tendering testimony thereon.

We will consider together the alleged error of the court in not submitting special issues to the jury, and the informality of their verdict, which is as follows: "We the jury in the above entitled cause, find the title to the right of possession of the area in conflict described in the complaint to be in favor of the plaintiffs"; upon which a judgment was rendered

to the effect that plaintiffs were entitled to the possession of the ground in controversy as against the defendants. It must be observed this verdict simply finds the plaintiffs are entitled to the right of possession; it does not show they have such right by reason of a compliance with the absolute requirements of the law, or that they have it as against the government, or any but the defendants. It amounts to a declaration that, as between the parties to the action, the plaintiffs showed the better right, and should prevail, which in *Golden Fleece Co.* v. *Cable Co.* 12 Nev. 320, was held the rule; but whether or not such was the law then, it has not been since the congressional act of March 3, 1881, providing that, if "title to the ground in controversy shall not be established by either party, the jury shall so find." Since this act it has become necessary that the decision whether by court or jury, must show, not only that the successful party is entitled to the possession as against his opponent, but also as against all others, including the government, and by a compliance with all the laws applicable. The government is interested in knowing, before issuing its patent to a party, that he is a citizen; that he has discovered a vein; that he has performed the $500 development work; that he has complied with the law.

It is provided that upon the judgment in these adverse claim cases being certified in the general land office, together with the proper certificates of such claim, a patent shall issue to the successful party. If, therefore, a judgment is sufficient which shows only, as in this case, the title to be in the successful party as against his opponent, it might frequently happen that a patent would issue to a party who was an alien, or who had never discovered a vein, or in other particulars had failed to comply with the law of congress. In the following cases judgments were reversed because of the insufficiency of the verdicts, some of which were more specific than the one under consideration: *McGinnis* v.

Egbert, (Colo.) 5 Pac 660; *Manning* v. *Strehlow*, (Colo.) 18 Pac. 625; *Thomas* v *Chisholm*, (Colo.) 21 Pac. 1020. And *Rosenthal* v. *Ives*, (Idaho) 12 Pac. 904, was reversed because the judge who tried the cause failed to find the successful party was a citizen. This was not because that was a material issue under our practice, but that it was necessary to show his compliance with the laws. All these authorities are sustained by *Gwillim* v. *Donnellan*, 115 U. S. 50, and we must hold the verdict in this case informal and cause for reversal. Our statute, by section 4397, after designating the class of cases in which it is optional with the jury to find a general or special verdict, further provides that "the court may direct the jury to find a special verdict in writing, upon all or any of the issues." In cases where the number and nature of the issues are such as likely to confuse the jury, the court can greatly aid it by formulating such issues into separate, distinct propositions, and thus have them submitted in logical concise questions, instead of in one confused mass.

Through a general verdict, a jury is more likely to jump to a conclusion, or yield to its impulse or sympathy, than when special issues are submitted, to which the facts can be directly applied. Certainly the court must submit only those materials, and only in such number and form as will aid, and not bewilder, the jury. Is this a matter left entirely to the discretion of the court? It might be so held if the statute were designed alone for the convenience of the court, but it is not. On the contrary, its object is to aid the jury to the proper conclusions, and to promote justice in the administration of the law. It is a discretion that must be soundly exercised by the court, and subject to review as any other discretionary power when not properly exercised. The complicated nature of the issues in this case is such as to render it one in which special issues should be submitted, if ever necessary in any case, and the court's error in refusing the request of the appellants in this matter is also cause for

reversal. The appellants also asked the court to have the jury view the premises, as permitted by our statute. There are many features of this case which mark it as one in which this request should have been granted, but whether the action of the court is cause for reversal, it is unnecessary to determine.

It follows from the foregoing that the judgment and order appealed from must be reversed, and the cause remanded for a new trial; and it is so ordered.

FINDING v. HARTMAN.

(14 Colorado 596; 23 Pac. 1004. Supreme Court. April 25, 1890.)

Sold before mined, to secure creditor. The contract of a mine operator with his suppliers by which he agrees to deliver the ore as mined to secure the store bill, although containing words of present transfer does not pass title until delivery of the ore.

[1]**Sale complete on delivery.** A lot of ore mined under such contract and loaded onto a car sealed and billed to the merchant is delivered, and a creditor of the mine attaching the same takes nothing by his levy.

Such contract is not within the statute of frauds nor void as against creditors, as a sale without delivery because it does not purport to be a sale until delivery.

Informalities cured by delivery. After ore is delivered by its owners to a bona fide buyer, a creditor of the mine owners can not attack the transaction for defect of parties to the bill of sale.

Appeal from the District Court of Summit County.

Dolman, Staley & Blackman, as lessees, were engaged in extracting and shipping ore from the Cincinnati mine, near Breckenridge. For the purpose of obtaining provisions and materials from time to time as needed to carry on said business, Dolman, in their behalf, entered into a

[1]*West* v. *Humphrey*, 17 M. R. 367.

A lessee agreed to furnish an ore buyer with regular shipments of ore, on default the ore buyer to take possession and get the ore himself. Contract upheld and ore buyer put in possession. *Lehigh Co.* v. *Trotter*, 43 N J. Eq. 185; 10 Atl. 608.

Ore buyer held not entitled to deductions for moisture after accepting ore without question on this point. *Trotter* v. *Heckscher*, 42 N. J. Eq. 251; 7 Atl. 353.

Contract between the mine owner and smelting company; failure to deliver ore; measure of damages. *Patrick* v. *Colorado Smelting Co.* 20 Colo. 268; 38 Pac. 236.

Defense on ore contract to make shipments, that payments were not made as the ore was delivered. *Cherry Val. Co.* v. *Florence Co.* 64 Fed. 569.

Ore purchase contract not assignable. *Winchester* v. *Davis Pyrites Co.*

written contract with J. H. Hartman, acting for the firm of J. H. Hartman & Bro., merchants in the town of Breckenridge. The terms of this contract sufficiently appear in the opinion.

Dolman *et al.* became indebted to Hartman & Bro. in the sum of $441, and in pursuance of said contract they undertook to deliver to Hartman & Bro. 13,518 pounds of selected ore. This ore was brought to the town of Breckenridge and loaded into a railroad car. Thereafter, and before the car was sealed, the deputy sheriff notified the station agent that he attached it, but made no effort to take possession. On the same day the car was duly sealed ready for shipment, in the name of J. H. Hartman & Bro., to whom the bill of lading was made out. At a later hour the sheriff and deputy returned, broke open the car, levied upon the ore under the writ of attachment, took possession, and removed it to the ground. Prior to this levy Hartman notified the officer that the ore belonged to J. H. Hartman & Bro.

The attachment proceeding mentioned was instituted by appellant Finding for a sum due him from Dolman and one Hudson, who had previously acted as copartners, under the firm name of Hudson and Dolman. Plaintiff obtained judgment for the amount of his claim, and the *regularity of the issue* of his attachment writ was sustained. Hartman & Bro., however, intervened under the statute, and upon the

67 Fed. 45. *Wheeler* v. *Walton Co.* 64 Fed. 664. *Arkansas Co.* v. *Belden Co.* 127 U. S. 379.

A promise to pay debt out of proceeds of ore is not an equitable assignment of such proceeds. *Silent Friend Co.* v. *Abbot*, 7 Colo. App. 73; 42 Pac. 318.

A in Michigan agreed to sell to plaintiff, graphite ore to be delivered on cars in Mexico; held that cause of action for non-delivery accrued in Mexico. *U. S. Co.* v. *Pacific Co.* 68 Fed. 442.

Contract to furnish ore no case for specific performance or accounting. *Campbell* v. *Rust*, 85 Va. 653; 8 S. E. 664.

Quality of ore left to buyers' foreman; damages for delay and refusal to receive shipments. *Alleghany Co.* v. *Teaford*, 96 Va. 372; 31 S. E. 525.

plea of intervention the principal trial took place. The intervenors recovered a judgment for the redelivery of the ore together with $50 damages. From that judgment the present appeal was taken.

Between the dates of levy and trial in the district court the ore lay on the ground, exposed to the weather, driven over and somewhat scattered by wagons, for a period of six months. The two grades into which it had previously been divided were by the sheriff, in unloading, indiscriminately mingled. Testimony was offered by plaintiff showing the injury thus occasioned. Proof was also admitted to the effect that Hartman & Bro. paid $75 attorney's fees at the first trial, which took place in the county court.

M. B. CARPENTER, for appellant.

MONTGOMERY & FROST, for appellees.

CHIEF JUSTICE HELM delivered the opinion of the court.

Finding was not a creditor of Dolman, Staley & Blackman, nor was he a creditor of Dolman alone. His claim was against Hudson & Dolman, a partnership that had previously ceased to exist. It is extremely doubtful, therefore, if he could in any event maintain his attachment upon the ore in question. Certain it is that he was not entitled to hold the interest therein of Staley and Blackman. The mere fact that their names do not appear in the so-called "bill of sale" to Hartman & Bro. does not conclude their rights in the premises. But we prefer to rest the present decision upon other grounds.

The jury must, under the instructions, have found that the ore in question was delivered to Hartman & Bro. before the levy of the attachment, and there is no doubt but the evidence amply sustains this finding. The attempt of the deputy

sheriff to levy his writ in the morning was ineffectual because he took no possession.

It is insisted, however, as a matter of law, that, under section 14 of the statute of frauds, the failure to make an immediate delivery of the ore, upon execution of the alleged bill of sale or assignment, rendered the entire transaction void as to creditors of the vendor. If this position be correct, it is decisive; for, as a matter of fact, twenty-six days intervened between the execution of the instrument and delivery of ore thereunder. Assuming, for present purposes, that Finding was a creditor of Dolman, Staley & Blackman, we shall proceed to consider this objection.

At the common law, and under statutes in affirmance of the common law, the absolute sale of personal property, unaccompanied by immediate delivery and continued change of possession, was regarded as fraudulent. But as to whether such transactions should be treated as frauds *per se* and void, or simply as indications of fraud in fact subject to contradiction by proof of good faith, and hence merely voidable, there was great contrariety of judicial opinion. In some instances the same tribunal has at different periods favored both doctrines; this is true of the Supreme Court of the United States. See *Hamilton* v. *Russell*, 1 Cranch, 310; *Warner* v. *Norton*, 20 How. 448. To put the matter entirely at rest, the specific provision under consideration was wisely enacted. Its conclusiveness in fixing upon such transaction the character of fraud in law, incapable of explanation, has been frequently recognized by this court. *Cook* v. *Mann*, 6 Colo. 21; *Wilcox* v. *Jackson*, 7 Colo. 521; *Ray* v. *Raymond*, 8 Colo. 467; *Bassinger* v. *Spangler*, 9 Colo. 175; *Sweeney* v. *Coe*, 12 Colo. 485.

The statute in question reads: "Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making

such assignment, or subsequent purchasers in good faith, and this presumption shall be conclusive." *Gen. St. ch.* 43, §14.

Obviously, this provision deals with sales or assignments of personal property capable of immediate delivery, when the present transfer of title is affirmed. It was intended to prevent fraud upon creditors and purchasers through retention of possession and continued apparent ownership after an asserted sale or assignment, complete in all other respects. The object of its framers was, so far as possible, to remove temptation for the commission of fraud in transferring the ownership of chattels.

The alleged bill of sale or assignment upon which reliance is placed in the case at bar does not belong to such a transaction. It is inartificially drawn, and the words, "sells, assigns, and transfers," are employed; but several elements usually characterizing an actual sale are absent. No present payment, either in money or goods, is recited, nor is a present delivery of ore pretended. No definite quantity of ore is mentioned, and no purchase price is specified. The ore itself had not been mined, and could hardly be said to have had more than a potential existence. It was not only incapable of immediate delivery, but, owing to the uncertainties of mining, serious doubt existed if delivery would ever be possible. Hartman & Bro. were only to receive enough of the ore as extracted to satisfy the amounts due from time to time, upon orders previously paid, either in goods or money. This might require the total output, or it might take but a small fraction thereof. If, perchance, more than a sufficient quantity of ore for this purpose were delivered, they would doubtless have to account to Dolman & Co. for the surplus of proceeds.

The idea of security is conspicuous in the writing, and the agreement is executory, having reference entirely to future transactions. It is intended to secure future advantages to one party, and give protection in connection therewith to the other. Hartman & Bro. are to furnish supplies and money,

and in return are to receive ore as mined. This agreement is binding between the parties, but it does not constitute a present absolute sale as to creditors. Hartman & Bro. have a right to require compliance so long as it is within the power of Dolman & Co. to render the same. But, if a creditor attaches before delivery under the contract, such creditor takes precedence in payment, and a title acquired through his levy would undoubtedly be good. Thus it appears that not only is the transaction in its nature intrinsically without the letter of the statute now under consideration, but also without its spirit; for creditors are not thereby deceived or prejudiced.

Under this contract, title to the ore on one hand, or to the goods or money on the other, does not pass until actual delivery thereof. But, since such actual delivery to Hartman & Bro. of the ore in controversy took place prior to the levy of the attachment writ, we are of the opinion that the title passed, and appellant took nothing through his subsequent levy.

We have avoided the discussion, because it would be improper, of the question elucidated in the California decisions referred to, viz.: Whether or not, when the chattel sold, being capable of immediate delivery, is retained by the vendor for a considerable period, but nevertheless is delivered to the vendee before levy of a creditor's writ, the sale is by the retention rendered void as to such creditor.

It appears from the evidence that, though the written contract was executed in the name of Dolman alone, it was in fact entered into on behalf of the partnership of Dolman, Staley & Blackman; also that it was carried out by this partnership. But if counsel's contention were true that, notwithstanding these facts, it could not be regarded in the present action as a partnership contract, appellant receives no benefit therefrom. The transfer to Hartman & Bro. being *bona fide*, and the title having passed by actual delivery before appel-

lant's levy, it is obviously a matter of indifference to him who the real vendors were. Nor can we agree with counsel that the slight variance relating to the firm name of the intervenors, pointed out between the plea of intervention and proofs, could in any way affect a substantial right of appellant. This objection must therefore be disregarded.

It is clear from the evidence that the jury awarded the $50 for injuries to the ore, occasioned by its exposed and unprotected condition while in the sheriff's hands. It could not have been given as reimbursement of the attorney's fee for the trial in the county court. If, therefore, there was any error in receiving evidence relating to this fee, or in submitting that matter to the jury, it was error without prejudice. The judgment of the district court is affirmed.

Affirmed.

HUNT ET AL. v. EUREKA GULCH MINING COMPANY.

(14 Colorado 451; 24 Pac. 550. Supreme Court. June 13, 1890.)

An adverse claim filed on the 62d day of publication is too late.

[1]**Suit supporting same.** When suit is brought purporting to support an adverse claim and it appears that the adverse claim was not filed within the sixty days allowed by law for filing the same, the suit is rightfully dismissed by the court at plaintiff's costs.

And it cannot be maintained under Section 257 of the Code, providing for the disposition of cases where plaintiff had title when suit was brought which has expired before judgment.

Although it takes 10 insertions in a weekly paper to complete a sixty days publication, the notice thus appearing during a period of 64 days, the period of publication expires with the 60th day.

Appeal from District Court of San Juan County.

CIVIL CODE, section 257, provides that an action may be brought by any person in possession of real property against any person who claims an estate or interest therein adverse to him for the purpose of determining such adverse claim or estate.

Revised Statutes of the United States, section 2326, provides that, where an adverse claim to the issuance of a patent for mining lands is filed during the period of publication of notice of application for the patent, all proceedings shall be stayed until the controversy is settled by a court of competent jurisdiction.

HUDSON & SLAYMAKER, for appellants.

MONTAGUE & FITCH and SAMUEL SLESSENGER, for appellee.

[1]*Steves* v. *Carson*, 16 M. R. 12. *Murray* v. *Polglase*, 23 Mont. 401; 59 Pac. 439. *Marshall Co.* v. *Kirtley*, 16 M. R. 6. *Ledger Lode*, 16 Land Dec. 101.

RICHMOND, C. By the record in this case it appears that the appellee, defendant below, on the 26th day of October, 1885, filed its application for a United States patent for a certain mining claim, particularly described in the complaint, called "No Name Lode," under the provisions of sections 2325, 2326, Revised Statutes of the United States; that notice of the application, by direction of the register and receiver of the United States land office at Durango, Colorado, was published in the Animas Forks Pioneer, and that the notice first appeared in the issue of said newspaper on the 31st day of October, 1885, and appeared in each and every weekly issue of said newspaper thereafter, up to and including the 2d day of January, 1886; that on the 1st day of January, 1886, appellants, E. W. Hunt and Thomas Doyle, plaintiffs below, filed their adverse to the application of appellee for a patent, and thereafter, on the 27th day of January, 1886, instituted this action to support such adverse filing.

The cause was tried to the court, and the court found that the adverse claim was not filed within the time allowed by law for filing adverse claims, and therefore dismissed the action, at plaintiffs' cost. To reverse this action this appeal is prosecuted.

The question for our determination is, did the plaintiffs file their adverse claim within the time allowed by law? if not, can they maintain their action? In the brief and argument appellants take the position that, whether an adverse claim be filed in the land office or not, still they are entitled to maintain their suit under section 257 of the Civil Code. The complaint in this case clearly shows the cause of action which the pleader intended to state. No one can read it and fail to conclude that the suit was brought upon an adverse filing, to contest defendant's application for patent to the premises in controversy, and that the purpose of the pleading was to put in issue and try the questions which by section 2326, Revised Statutes of the United States,

are submitted to courts for adjudication. The language of the complaint is that they "were the owners of and in possession of certain mining premises situate, lying and being in Eureka mining district in the county of San Juan, Colorado; * * * that the said premises comprise all of that certain lode mining claim that is known and recorded as the 'Nameless Lode'; that the defendant claims an estate or interest in and to said premises, and all thereof, adverse to that of plaintiffs; that defendant has made application at the United States land office at Durango, Colorado, for a patent for all of said premises, claiming in said application to be the owner of said premises under the name of the 'No Name Lode'; that the application for the patent is still pending, and that the plaintiffs on the 1st day of January, 1886, to protect their title and right of possession in and to said premises, filed in the United States land office at Durango, Colorado, their protest and adverse claim against the issuing of a patent for said premises to defendant or other person; that this suit is begun in support of the said adverse claim of the plaintiffs."

The above is all of the complaint necessary for us to recite to indicate unmistakably the purpose and object of the action. To permit the plaintiff, after the trial of the cause, to assume altogether another and a different object, would be in violation of every rule of pleading. The allegations in the complaint determine the character and object of the action. *Becker* v. *Pugh*, 9 Colo. 589; *Marshall Co.* v. *Kirtley*, 12 Colo. 410.

The plaintiffs having elected to proceed under the provisions of the section above referred to, the next and only remaining inquiry is, did they bring themselves within the provisions of those sections? It is admitted by the complaint and in the argument of appellants that the appellee made its application for the patent on the 26th day of October, 1885, and that, pursuant to the order of the register and

receiver of the United States land office, notice of this application was published on the 31st day of October, 1885, and that the appellants did not locate the claim and file the adverse until the 1st day of January, 1886.

Section 2325 provides that upon filing an application for a patent for land, the register of the land office "shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim, and he shall also post such notice in his office for the same period of time. At the expiration of the sixty days of publication the claimant shall file his affidavit showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office, at the expiration of the sixty days of publication it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of $5 per acre, and that no adverse claim exists, and thereafter no objection from third parties to the issuance of the patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

In *Wight* v. *Dubois*, 21 Fed. 693, Judge Brewer, adopting the construction of these provisions announced by Judge Hallett in the same case, sums up in brief his conclusions (page 696), as follows: "(1) The government, as a landowner, offers its lands for sale upon certain prescribed conditions, compliance with which is a matter of settlement between the owner and the purchaser alone, and with which no stranger to the title can interfere. (2) Publication of notice is process bringing all adverse claimants into court, and, if no adverse claims are presented, it is conclusively presumed that none exist, and that no third parties have any rights or equities in the land. (3) Thereafter the only right or privilege remaining to any third parties is that of

protest or objection filed with the land department, and cognizable only there; if sustained by the department, the proceedings had by the applicant are set aside; if overruled, the protestant or objector is without further right or remedy."

Accepting the above conclusions of the learned judge as being the correct interpretation of the statute, it follows that, unless the appellants have brought themselves within the provisions of the law by filing their adverse claim within the sixty days provided for the publication of notice, the action of the court in dismissing the complaint must be sustained.

It is contended by appellants that because this notice was published first on the 31st day of October, 1885, and last on the 2d day of January, 1886, and their adverse claim was filed on January 1, 1886, the adverse was duly filed within the period of time prescribed by law. In other words, appellants claim that they have sixty-two days within which to file their adverse. This very question has received the consideration of the honorable secretary of the interior in *Miner* v. *Marriott*, 10 Copps Land Own. 339. He held that, notwithstanding the fact that the regulations of the department require ten weekly publications of such notice, making sixty-three days between the first and last publication, yet, nevertheless, the adverse claim must be filed within sixty days, as provided by the statute. In arriving at this conclusion the honorable secretary says that "nine issues of a weekly paper would not cover the required period. It is true that the tenth insertion carries the publication three days beyond the legally required sixty days, yet for the purpose of meeting the requirement of law ten insertions are in fact necessary, since the continuity for sixty days can be preserved only by the tenth publication, which falls on the sixty-third day after the first. It is also true that the applicant cannot proceed to complete his entry until after the tenth publication, but this is because it is essential as proof of sixty days' publica-

tion. These reasons do not apply to an adverse claimant, and his acts are not controlled thereby. He has the plain letter of the law for his guide. His course is clear and his duty plain. He has sixty days, on any one of which he may file his adverse claim; if he fails to file within the sixty days of publication prescribed by the law, he is barred. Before either party can recover in an 'adverse' mining suit he must show a compliance with the statutes, state and federal, and local miners' rules and regulations relating to the location of mining claims." *Becker* v. *Pugh, supra.*

We are not without authority in our own court to support the conclusions of the court below. In *Marshall Co.* v. *Kirtley, supra,* this court held that "an allegation in the complaint, in an action for the recovery of possession of a mining claim, that the action is brought in support of adverse claims, must be regarded as determining the character and object of the action, viz., to establish plaintiff's right to possession by reason of a valid location thereof under the adverse claims in support of which the action is brought, and to stay defendant's proceedings under his application for a patent until the plaintiff's right under his adverse claims may be adjudicated. * * * It therefore becomes a material question whether the requirements of the statute in relation to filing such claims have been complied with," and an allegation in the answer that defendant's right to a patent was not adversed by a claim under which plaintiff claims the right of possession of the premises in controversy presents a good defense. Quoting further from this opinion, at page 415, after citing the statute, the court says: "By these provisions of the statute, the filing of an adverse claim is made the first step to be taken in proceedings for determining the right of possession and title under a valid location for the purpose of establishing the right to a patent, and upon taking this step the issuance of a patent is stayed until such right has been determined, or has been waived by the party filing such

adverse claim. That a party who commences an action under the statute to determine such right of possession must stand or fall by the rights which he has asserted in his adverse claim seems evident from the requirement of the statute that the nature, boundaries and extent of such adverse claim must be shown by the adverse claim filed."

In the *Eureka Case*, 4 Saw. 302, Justice Field uses this language: "When one is seeking a patent for his mining location, and gives proper notice of the fact as therein prescribed, any other claimant of an unpatented location objecting to the patent of the claim, either on account of its extent or form, or because of asserted prior location, must come forward with his objections, and present them, or he will afterwards be precluded from objecting to the issue of the patent."

Appellants cite in support of their position *Decker* v. *Myles*, 4 Colo. 558. The conclusion of the court in that case was based upon a section of law which required a notice to be published once a week for three consecutive weeks; consequently it is not in point. Other cases cited are not upon similar provisions; therefore do not apply. The number of publications is not provided for by the provisions of the United States law. By no system of computation can we arrive at any other conclusion than that the full time required by the statute had expired before plaintiffs' adverse claim was filed. "A distinction, however, is made between statutes requiring publication for a certain period of time in what manner soever such period is denominated, and those requiring the insertion of the notice a certain number of times in a newspaper, where the continuance of the publication will be determined by the number of regular issues within a given time." Wade, Notice, § 1077.

The time for filing an adverse can no more be extended than can be the time for commencing action after filing such adverse, and it cannot be said that the plat and notice required to be posted on the claim must remain so for a longer

period than sixty days. The publication is made by posting a notice in the office of the register and receiver, upon the claim, and publishing in a newspaper for the period of sixty days. Failure to do either would not be a compliance with the statute, but, as in this case, doing all in the manner directed will defeat an adverse claimant who fails to file the adverse within the period of sixty days. Our conclusion, therefore, is that, the plaintiffs having failed to file their adverse in the United States land office within the time prescribed by the statute, the court was justified in dismissing the complaint.

The judgment should be affirmed.

PATTISON and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

HAYT, J., having presided at the trial below, did not participate in this decision.

CRAWFORD ET AL. v. WITHERBEE ET AL.

(77 Wisconsin 419; 46 N. W. 545. Supreme Court. September 23, 1890.)

[1]**Perpetual covenant. Reward for drainage.** By a contract under seal C., M. & Co. agreed to excavate or run a "level" to drain certain mineral lands, and, in consideration thereof, W., the owner, agreed to render to them one eighth of all the mineral raised on said lands. It was expressly stipulated that the contract should be binding upon the heirs, executors, administrators, and assigns of both parties, and that the covenant of W. should run with the land; and, to secure to C., M. & Co. one eighth of the mineral raised, an undivided eighth of all the mineral in the lands was conveyed to them. *Held*, that the covenant of W. ran with the land.

Question as to party to repair tunnel not raised. The contract was silent as to the depth to which the level should be excavated, and as to who should keep it in repair. In an action by the successors in title of C., M. & Co. against devisees of W. to recover the value of one eighth of the ore raised on the lands during a certain time, it appeared that though the level was somewhat out of repair, yet the ore was got without trouble or increased expense by reason of water. *Held*, that the question whether or to what extent the plaintiffs were bound to keep the level in repair, was not raised.

Admission implied from notice. A notice, given by the defendants to the plaintiffs before the action was commenced, to repair the level in compliance with the original agreement, is an admission that the plaintiffs are the successors of C., M. & Co., in the title.

Objection as "immaterial" admits authentication. An objection to the admission of a will in evidence on the ground that it is immaterial and incompetent for any purpose, is not available to exclude it on the ground that it is not sufficiently authenticated or proved.

Appeal from Circuit Court, La Fayette County.

[1]*Electric Co.* v. *West Ridge Co.* 187 Pa. 500; 41 Atl. 458.

Covenant to leave in good and workmanlike condition does not bind tenant for value of disused machinery. *Timlin* v. *Brown*, 158 Pa. 606; 28 Atl. 236.

A covenant to "use all economy" in a mining lease is too general to be enforced. *Benavides* v. *Hunt*, 79 Tex. 383; 15 S. W. 396.

ORTON & OSBORN, for appellants.

CARTER & CLEARY, for respondents.

ORTON, J. The facts of this case are briefly and substantially as follows: About the 10th day of September, 1862, Jefferson Crawford, (now deceased,) John L. Crawford, Gabriel Mills, (deceased,) and Henry Magor, as parties of the first part, entered into a contract in writing and under seal with one Hiram Witherbee, (now deceased,) who was the owner of the lands therein described, and situated in La Fayette County, in this state, by which the said party of the first part agreed to excavate or run what is usually called a "level," commencing at the bottom of the tail race of "Crawford's Big Wheel," in a northerly direction up what is known as "Hard Scrabble Branch," or in such direction as they may deem best calculated to drain the said lands of said Witherbee, to be excavated as nearly level in its course as the purpose for which it is intended will permit, and to be commenced within a reasonable time after that date, and prosecuted with reasonable facility. The level was to be run a considerable part of the way through the lands of said Witherbee, described in the agreement, which were supposed to be mineral lands, and to contain lead, and which could not be mined, on account of water, without being drained by said level, and which lay south of the north end of said level, and east and west of it. In consideration of the excavation of said level, the said Witherbee agreed to render to the party of the first part one clear eighth part of all lead mineral or lead ore raised upon said lands which lie east and west of any excavated portion of said level, and south of an east and west line across the extreme northerly end of the same, as fast as said level shall be prosecuted, free from all expense of discovering or separating it from the earth, and to be paid in kind on the land where raised. It is expressly stipulated in said agreement

that it shall bind the heirs, executors, administrators, and assigns of both parties, and that the said covenant of said Witherbee shall run with said lands. In the said agreement, and for the purpose of securing to the party of the first part one-eighth of all mineral raised on said lands, the said Witherbee thereby grants, bargains, and sells to the party of the first part, and to their heirs and assigns forever, one undivided eighth part of all lead mineral in any and all of said lands, to have and to hold the same, together with all and singular the right accruing under the agreement to the said party of the first part, and to their heirs and assigns forever.

It was found by the court, that Crawford, Mills & Co., (said party of the first part,) within a reasonable time after the execution of said agreement, began said level, and that it was excavated and run by them with reasonable energy and diligence to a point where an east and west line drawn across its northern extremity will pass northward of the places where the ores in controversy were mined, and that the same was so excavated and built many years before the said ores were mined; that the title of said Hiram Witherbee (now deceased) to said lands has become vested in the defendants by and through his devise thereof in his last will and testament, and that they are now in possession of them, and claim title thereto by virtue of said will and conveyances thereunder, and that the plaintiffs are the successors in title of the said Crawford, Mills & Co., and the owners of all the interest in and to said lands of said Hiram Witherbee, conveyed by him in and by said agreement, and are also the owners of said level; that from the date of said agreement to February 1, 1885, the said Hiram Witherbee in his life-time, and the defendants since his decease, paid to said Crawford, Mills & Co., or to said plaintiffs, all rents which accrued to them under and by virtue of said agreement, but since that time the defendants have paid none of the same; that since that time

the defendants have received and retained as the proceeds of the sale by them of one-eighth of the ores raised and mined on said lands, lying south of an east and west line drawn across the northern end of said level, the sum of $670.21, no part of which has been paid to or received by the plaintiffs; that all of said ores were mined and raised from said lands without hindrance, impediment, increase of cost, or trouble by reason of water therein, and most, if not all of them, were so mined and raised from below the water-level therein before the construction of said level, and above the present water-level in said lands.

The court further found that the level was somewhat out of repair, but that there is a continuous underflow through each of its shafts, and that at least two-thirds as much water pours out of the mouth of said level as it ever discharged since its construction, and that the said Hiram Witherbee in his lifetime, as late as August 2, 1866, by a certain supplemental agreement, approved and applauded the manner in which said level had been built, down to that time, and the energy with which the work of constructing it had been pushed. These findings appear to have been justified and supported by the evidence.

1. The learned counsel of the appellants contend that the defendants are discharged from the obligation to render such one-eighth of the mineral to the plaintiffs, because the level or drain was so badly out of repair when it was raised or mined. It does not appear that the defendants were at all injured or prejudiced by any want of repair of the level, if there was any, or that they were at all troubled by water in their mines. The agreement for the construction of the level is silent as to the depth it should be excavated. It only requires the level to be so constructed as to drain or uncover the lead ore so as to permit it to be raised or mined, without any trouble or inconvenience from water. Filled up to some extent, as it may be, the level seems to be yet deep enough

for all practical purposes, and the defendants have no cause of complaint. It follows, therefore, that the question as to whether the plaintiffs are bound to keep the level in repair, or to what extent they are so bound, is not raised.

2. The point made that the will of Jefferson Crawford was not sufficiently authenticated or proved to be admitted in evidence can hardly prevail—(1) Because the objection was not specific; that it was not properly authenticated. The objection was that the will was immaterial and incompetent for any purpose. (2) Because the defendants introduced in evidence a notice signed by one of them, dated December 8, 1884, by which the plaintiffs were notified to repair said level in compliance with said original agreement, and that they should withhold the rents until it should be restored to its original usefulness. This notice is an admission that the plaintiffs are the proper parties as successors of Crawford, Mills & Co. in the title, and bound by the agreement. This cured any error that might have been committed in improperly receiving the will in evidence.

The main and important question in the case is whether the covenant sued upon "runs with the land." On that question, the learned counsel on both sides have submitted unusually able arguments and briefs. We may not follow the learned counsel through their able reasoning and well-selected authorities, but it will not be from any want of appreciation for their professional labor. It appears to us that the covenant to render one-eighth of the mineral to the covenantees, read in connection with the dependent covenant, to construct the level for the purpose of making the lead ore in the land available, and the grant of one-eighth of such ore in the land, comes within every essential element of one that runs with the land, and binds the present parties. (1) There is an estate granted. (2) The performance or non-performance of the covenant affects the nature or value of the property conveyed. (3) There is a privity of estate between the

contracting parties. Platt, Cov. 461. One-eighth of the mineral is granted or conveyed. While the mineral is in the earth, undiscovered and unmined, it has but little or no value. The covenant requiring the grantor to raise or mine, and deliver it to the grantees, gives it value. There is not only privity of estate, but the parties are tenants in common of all the mineral in the land. The covenantees own one undivided eighth of it, and the covenantor reserved and owns seven-eighths of it, and covenants to raise, separate and deliver the one-eighth. The possession of the undivided mineral in the land, by the covenant, remains in the covenantor, until it is raised, divided, and delivered. The grant without the covenant would make each party liable to contribute a proportionate share of the labor and expense of raising or mining it. *Clark* v. *Plummer*, 31 Wis. 442. The covenant imposes this burden wholly upon the grantor, or the owner of the seven-eighths share. In that it also affects the quality and nature of the estate granted. The grant of the one-eighth of the mineral in the land is a grant of an interest in the land, and a part of the realty. *Golden* v. *Glock*, 57 Wis. 118; 15 N. W. Rep. 12; *Daniels* v. *Bailey*, 43 Wis. 566; *Young* v. *Lego*, 36 Wis. 394. Besides this, the grant with the covenant creates a charge upon the land to secure the mining and delivery of the one-eighth in the nature of a mortgage.

If the grant and covenant together do not sufficiently show the real nature of the covenant, the dependent covenant of Crawford, Mills & Co., to construct the level or drain through and above the lands containing the mineral, for the sole purpose of making it possible to mine the lead ore in it, as the consideration of the covenant to raise and deliver the one-eighth of it, will very clearly and conclusively show the latter covenant to be one that runs with the land. By that covenant, they are to construct, at vast expense, such a level as will remove the water from the lead deposits so that they may be mined with facility, and thereby give to the mineral

in the land almost, if not quite, its entire value, and make it possible to deliver the one-eighth, and to secure the seven-eighths of it to the covenantor. Both parties are interested proportionably in and dependent upon that great and common improvement for the value of their respective shares of the mineral. It is the common source of their beneficial interest in the land. As long as the level drains the mineral deposits, each party may make available his interest in the land; and, when it fails to so drain the lands, both parties will lose that interest. Suppose that agreement had provided that each party should bear their proportion of the expense of constructing the level, and keeping it in repair, so that their respective shares of mineral could be raised, would not such a covenant run with the estate granted to Crawford, Mills & Co.? If so, then it follows that the covenant of Hiram Witherbee, to raise and deliver to them one-eighth of the mineral granted, is such a covenant, for they would be mutual and dependent covenants in such a case, and if one runs with the land the other would also.

In *Wooliscroft* v. *Norton*, 15 Wis. 198, the owner of the dam and water-power deeded to another certain square inches of water, to be furnished from the dam, and the grantee covenanted to pay his ratable share of the expenses of keeping in repair the dam and race-way in proportion to the number of square inches of water by him owned. It was held that such covenant ran with the estate granted, and was binding upon subsequent owners. How much more the covenant under consideration. It is not only incident to the property conveyed, and affects its value, but it lies directly on the estate granted, is inseparable from it, as its subject, and rests upon the same consideration. It is precisely the same as it would be if it was a covenant in the deed granting the one-eighth, imposing upon the grantor the duty or burden to raise and deliver the mineral granted. That case certainly rules this in principle, and is conclusive of the question.

I regard this case as one of the strongest and most unquestionable to be found in the books of a covenant running with the land. It is like a covenant in a deed to let the grantee into possession of the premises at once, or at a future time. It is necessary to make the grant available.

The covenant in *Spencer's Case*, 1 Smith, Lead. Cas. 145, was that the lessee should build a wall on the demised premises. The sixth point resolved in that case was, if the lessee covenant to repair the houses during the term, it shall run with the land. The reasons given were that, if it was not so, great injustice would be done to the lessor, and that reason requires that they who shall take benefit of a covenant should be bound by it. These reasons apply with great force here. The covenantees would loose all benefit from the construction of the level, and the grantor and covenantor would have all the advantages of the covenant that secured the construction of it, and it would be the greatest injustice to the covenantee. The principle seems to be, in these cases, that something is to be done on the land or estate granted, which is the case here. The case is put of a covenant to cultivate the lands demised in a particular manner. *Cockson* v. *Cock*, Cro. Jac. 125, and many other cases in point with this case. In *Norman* v. *Wells*, 17 Wend. 146, the covenant was by the lessor that he would not let or establish any other mill on the same stream for sawing mahogany. It affected the value of the demised premises, and, in the case put by Judge COWEN, the covenant of the lessor was to repair the demised premises. *Lattimer* v. *Livermore*, 72 N. Y. 174; *Astor* v. *Miller*, 2 Paige, 68; *Van Rensselaer* v. *Dennison*, 35 N. Y. 393; *Thomas* v. *Von Kapff*, 6 Gill & J. 372; *Hurst* v. *Rodney*, 1 Wash. C. C. 375; *Worthington* v. *Hewes*, 19 Ohio St. 66. These and other cases cited in the brief of the respondent's counsel establish the same principles of this case. But none of them present so many reasons for the rule as this case. It would be useless to refer to more authorities upon a question

on which so much learning and research have been expended. Every case must be brought to the test of the few general principles above stated, and the question can be more satisfactorily determined in that way than by a multiplicity of adjudicated cases, more or less remote in their facts.

The authorities cited by the learned counsel of the appellant appear to be quite inapplicable. The intention of the parties, if it can be ascertained from the agreement, should have weight in cases of doubt, and in this agreement the parties have repeated, in every form, clauses to bind their heirs and assigns, and specifically stipulated that this covenant should "run with the land." But this is no doubtful case. We think the learned Circuit Court decided the question correctly, and held the present parties liable on the covenant to raise and render the one-eighth of the ore granted, and especially to pay for that share of the ore which they have already raised or mined, and converted to their own use. We can find no error in the case.

The judgment of the Circuit Court is affirmed.

ROBERT COLES ET AL. v. J. W. KENNEDY.

(81 Iowa 360; 46 N. W. 1088. Supreme Court. October 25, 1890.)

[1]**Mining prospect good consideration for stock deal.** The defendant, being the owner of a silver mine in Arizona, prospected the same to the extent of driving a tunnel for a short distance, and sinking a shaft to about twenty feet, resulting in a find of a small vein of silver ore. He thereupon organized a stock company in Iowa to operate said mine, with a capital stock of five hundred thousand dollars. In consideration of seventy thousand dollars' worth of such stock the plaintiff agreed to pay defendant seventeen hundred and fifty dollars, or convey to him certain real estate. *Held*, that the contract was not without consideration, nor was the consideration so inadequate as to constitute a badge of fraud.

Pretense that gratuity holder was a real buyer. The representation by a promoter of a corporation to one, as an inducement to his subscription to the capital stock in such corporation, that a person named, of wide reputation for his sagacity in business affairs, had agreed to subscribe for a large amount of the same stock, without disclosing the fact that said stock was given such person as a gratuity for the use of his name, is such a fraud as will entitle one who has subscribed for stock upon the faith of such representation to have his contract of subscription canceled in a court of equity.

Appeal from District Court, Lucas County; CHARLES D. LEGGETT, Judge.

Action in equity to cancel and annul a certain written contract for the conveyance of real estate, upon the grounds that the same was obtained by fraud, and without consideration. The answer denies each allegation of fraud and want

[1]The owner of fixtures (a salt derrick) attempting to remove them, the owner of the land objected, whereupon the owner of the fixtures agreed to replace them after he had used them at another well. *Held*, as they did not belong to the owner of the realty, there was no consideration for the contract to replace. *Bewick* v. *Fletcher*, 41 Mich. 625.

The uncertainty of oil product may make a small sum a fair consideration. *Neill* v. *Shamburg*, 158 Pa. 263; 27 Atl. 992.

of consideration, and asks specific performance of the contract. Decree was entered in favor of plaintiff granting the relief prayed for in the petition. Defendant appeals.

F. M. STUART, for appellant.

MITCHELL & PENICK, for appellee.

GIVEN, J. The testimony shows that in 1880 appellant was the owner of a mining claim in Arizona, called the "Mina Rica," that had been prospected to the extent of driving a tunnel for a short distance, and sinking a shaft to about 20 feet. A small vein of silver ore was found in the shaft, but not in quantity to justify milling the same. In the spring of 1880, appellant returned from Arizona to Chariton, bringing with him specimens of ore which he represented to have been taken from his claim. He proceeded to organize a joint-stock company for gold and silver mining in Arizona, "and to purchase the three-fourths interest of the Mina Rica mine." A company was organized with a large capital stock, divided into shares of $20 each. Appellee subscribed for 4,000 shares of stock, to be paid for at "fifty cents per share, as per agreement with J. W. Kennedy and R. M. Moore." The contract in question was executed and acknowledged April 1, 1880. By it appellee acknowledged himself to be indebted to the appellant in the sum of $1,750, to be paid on or before April

Sufficient proof of amount agreed on. *Thomas* v. *Frank*, 16 Mont. 297; 40 Pac. 762.

Where only one party bound there is no consideration. *Eclipse Co.* v. *South Co.* 47 W. Va. 84; 34 S. E. 923. *Gordon* v. *Darnell*, 2 M. R. 221.

A failure to work the mine etc., which was the consideration of the deed conveying an undivided interest does not constitute a failure of consideration. *Downing* v. *Rademacher*, 62 Pac. 1055; Modified 133 Cal. 220; 65 Pac. 385.

Construction of one dollar consideration. *Brown* v. *Fowler*, 65 Oh. St. 507; 63 N. E. 76. *National Co.* v. *Teel*, (Tex.) 67 S. W. 545.

1, 1881, and, if not paid at that time, appellee was to make to appellant a warranty deed for a certain lot in Chariton. If one-half of said sum was paid within the time named, appellant was to have a deed for the east half of said lot. The only consideration for this contract was 3,500 of the 4,000 shares subscribed for by appellee, the other 500 shares being given to him free of charge. After the organization of the company, appellant gave to appellee and other subscribers orders on the company for their stock. These orders were taken up, and the parties credited with their stock, and statements issued to them showing the amount they were entitled to. As the company desired to raise funds by the sale of stock, it was resolved that none should then be issued to the promoters.

I. But two questions are involved in this case, to-wit: Was the agreement without consideration, and was the plaintiff induced to sign the same by fraud? In considering these questions, we are to look at the facts as they were then known to the parties. It is not true, as urged, that all the mining company had was a hole in the ground 20 feet deep. It had the right to prosecute its business of mining upon that claim to whatever extent it pleased. True, the result was uncertain, but it owned a mining claim, that had been prospected to the extent stated, located in a mining region in the vicinity of valuable mines, and had at least an inviting show of valuable ore. The consideration for the agreement in question was a large amount of stock in the company owning this mining claim, with its limited development and the right to develop it indefinitely. There was certainly not a want of consideration for this contract.

II. We next inquire whether the appellee was induced to execute this contract by reason of fraud, as alleged upon the part of the appellant. It is urged that there is such inadequacy of consideration as to indicate fraud. There was great uncertainty as to what appellee might realize out of the con-

sideration moving to him, but it was not so inadequate as to constitute a badge of fraud. The fraud alleged is that to induce appellee to subscribe for stock in the mining company and to execute said agreement, appellant exhibited specimens of silver ore containing large and rich proportions of silver, and caused it to be represented to appellee that said ore was taken from the Mina Rica mine; that appellant represented to appellee that one S. H. Mallory had subscribed and paid for 5,000 shares in said mining company; that each of said representations was false and fraudulent; that said mine did not have any silver or gold ore in it, and never had; that the ore exhibited to appellee did not come from and was not taken from said mine; that said S. H. Mallory had subscribed for 5,000 shares, with a secret contract with defendant that they should cost him nothing. All the witnesses testifying upon that subject agreed in stating that there was silver ore in the shaft sunk upon the claim. Appellant testifies that the specimens of ore which he exhibited to appellee were taken from that claim, and this testimony stands uncontradicted by any reliable evidence.

S. H. Mallory had resided in Chariton for many years, and was known in the community as a man of large business experience and capacity, and a successful business man, whose name as a subscriber would be influential in inducing others to take stock in the mining company. While it is true that Mr. Mallory's name follows that of appellee on the subscription list, it appears that he had agreed to take stock previous to the time the list was circulated for signatures, and that the fact of his agreeing to take 5,000 shares of the stock was held out to appellee as an inducement to execute the contract in question. The testimony shows that Mr. Mallory was to have his stock free of charge, and that it was given to him to secure the influence of his name in procuring appellee and others to subscribe. The fact that Mr. Mallory was not to pay for his stock was concealed from the appellee. To have disclosed

it would have been to defeat the very purpose for which the 5,000 shares were given to Mallory. We have no doubt but the belief that Mr. Mallory had subscribed for 5,000 shares of the stock, and that he had or was to pay for the same, operated as an inducement to appellee to subscribe for stock, and execute the contract in question. This was such a fraud as cannot have the approval of a court of equity, and for which the contract induced by it should be canceled and held for naught.

On the trial appellee examined several witnesses as to representations made to them as inducements to subscribe for stock, to which defendant objected, because not made to or in the hearing of the plaintiff, and did not operate as an inducement to him to sign the contract in question. This testimony was taken under defendant's objection. It is not now claimed to be admissible, and therefore has not been considered.

The views expressed lead us to the conclusion that the decree of the District Court should be affirmed.

THE SAMPSON MINING & MILLING CO. v. CHARLES SCHAAD.

(15 Colorado 197; 25 Pac. 89. Supreme Court. November 19, 1890.)

[1]**Miner takes the risk of the trade.** It is the duty of mine operators to exercise reasonable diligence to avoid danger, and when this is done the miner assumes the ordinary perils of the employment.

[2]**Evidence to show defective timbering.** In an action based on want of care in the timbering, proof may be admitted of the mode of placing of adjacent timbers, as raising the inference that those particular timbers which gave way were constructed with the same faults.

Questions of negligence and contributory negligence are generally questions of fact—the findings on which will not be disturbed where supported by evidence, although the evidence be conflicting.

A trammer is not supposed to have such knowledge of timbering as to make him guilty of contributory negligence by remaining in a mine defectively timbered.

Appeal from District Court of San Juan County.

Charles Schaad, plaintiff below, brought this action against the Sampson Mining & Milling Company for personal injuries suffered by himself while at work for defendant in the lower level of its mine. The injuries were very serious, and were occasioned by the falling of the roof of the mine, thus

[1]Blacksmith sent below to do special work, does not assume miners risks. *Brazil Co.* v. *Hoodlet*, 129 Ind. 327; 27 N. E. 741.

A servant though a minor is not bound to be notified of what he should know in the course of his employment. *Lehigh Coal Co.* v. *Hayes*, 128 Pa. 294; 18 Atl. 387; 15 Am. St. R. 680.

Defendant liable for defects which he had opportunity to discover and did not. *Bennett* v. *Standard Co.* 158 Pa. 120; 27 Atl. 874.

Accident from scale. Defendant liable if avoidable by inspection. *Buckley* v. *Port Henry Co.* 2 N. Y. Sup. 133. Otherwise not liable. *Reed* v. *Stockmeyer*, 74 Fed. 186.

Application of the rule that a servant takes the risk of the trade as against obvious dangers. *Quick* v. *Minnesota Co.* 47 Minn. 361; 50 N.

burying plaintiff under the roofing material and a great quantity of rock and other *debris*.

The injuries are alleged in the complaint to have happened without any fault or negligence of plaintiff, and to have been caused by the improper construction and unsafe condition of said roof; that such unsafe condition was, at the time of plaintiff's injuries, and long prior thereto, known to defendant; and that said injuries happened in consequence of the failure of defendant to provide plaintiff with a place in which he could do his work with reasonable safety.

The answer admits its employment of plaintiff, as set forth in the complaint, and that the roof of the mine fell upon plaintiff, but denies that the falling of the roof was caused by the negligence of defendant, denies the extent of plaintiff's injuries as alleged, and denies the other allegations of the complaint.

The trial resulted in a verdict and judgment for plaintiff. Defendant brings this appeal. The only assignments of error insisted on are to the effect that the verdict is against the

W. 244. But not where ordered into danger. *Schlacker* v. *Ashland Co.* 89 Mich. 253; 50 N. W. 839.

Falling scale; failure to test by tapping. Effect of rule disregarded by company and not known to miner. *U. P. Ry.* v. *Jarvi*, 53 Fed. 65.

The working out of a pin is presumptive proof of negligence. *Houston* v. *Brush*, 66 Vt. 331; 29 Atl. 380.

Actual knowledge in master not necessary if by care he could have known the defect. *Id.*

Workman has right to assume that roof is safe; negilgence in such case a question of fact. *Vanesse* v. *Catsburg Co.* 159 Pa. 403; 28 Atl. 200.

Negligence of fellow servant no defense if the master knew the dangerous condition of the roof. *Hancock* v. *Keene*, 5 Ind. App. 408; 32 N. E. 329.

Scale case; miner not bound to quit after promise to repair. *Rogers* v. *Leyden*, 127 Ind. 50; 26 N. E. 210.

Plaintiff killed by falling wall of earth. Custom to inspect from time to time. *Held*, that deceased did not take the risk caused by failure to inspect the wall. *Buckley* v. *Port Henry Co.* 2 N. Y. Sup. 133.

[2]*Soyer* v. *Great Falls Co.* 15 Mont. 1; 37 Pac. 838.

law and is not sustained by the evidence, and that the court erred in admitting improper evidence on behalf of plaintiff against the objection of defendant.

Mr. H. O. MONTAGUE, for appellant.

Mr. JUSTICE ELLIOTT delivered the opinion of the court.

That it is the duty of employers engaged in extracting ores from the bowels of the earth to exercise reasonable diligence to keep their mines secure from danger to their employees, and that miners engaging in such service assume the ordinary risks and perils incident to such employment, are legal propositions which were accepted as correct in the court below as well as on this appeal.

Considerable evidence was given at the trial by persons of learning and experience in timbering mines, showing how timbers should be placed in and about the walls and roofs of mines in order that the same might be reasonably secure from danger. This evidence was for the purpose of establishing, in the minds of the jury, a standard by which they could determine whether or not the defendant company had discharged its duty to its employees by providing them with a reasonably safe place to perform their service, considering the nature of their employment. Evidence was also admitted tending to show that the timbers in defendant's mine were not placed in proper position to make a reasonably strong and secure roof; and, in this connection, evidence was admitted against the objection of defendant showing the position or angle at which the stulls were placed in, upon or against the walls of the mine adjacent to the place of the accident, as well as the position of the particular stull which gave way.

It might be impossible to show with certainty, by direct evidence, the precise position which the fallen stull occupied before the accident, so as to determine whether there was

or was not negligence in placing the same in the roof. Hence, it was proper to admit evidence showing the construction of other parts of the roof adjacent thereto so far as such other parts could be shown to have been constructed in a similar manner. From such *data* a legitimate inference might be drawn as to the cause of the roof giving way as it did. It was not error to admit such evidence.

It is insisted by counsel for appellant that the evidence is not sufficient to sustain a finding of negligence against the defendant company; and that, even if the evidence would justify such finding, it also shows plaintiff to have been guilty of contributory negligence, inasmuch as he had been employed as a workman in and about the mine at different times for a considerable period before he was injured.

The plaintiff's employment was to haul ore from the interior of the mine to the ore-house by means of a vehicle called a "tram." In mining parlance, he was called a "trammer." He was not a skilled miner, but a common laborer. He did not profess to be skilled in timbering mines; nor does it appear that his duties required that he should be; neither does it appear that he had anything to do with constructing the roof which fell, or any part thereof. His means of knowledge concerning its condition, therefore, was simply a matter for the consideration of the jury in determining the question of contributory negligence. *Wells* v. *Coe*, 9 Colo. 167.

We have carefully examined the evidence. It is somewhat conflicting, and it may be admitted that the jury would have been warranted in rendering a different verdict. We do not however, perceive any clear and substantial reason which would justify an Appellate Court in exempting this case from the application of the rule that questions of negligence and contributory negligence are generally questions of fact to be determined by the jury under proper instructions from the court upon matters of law. *Electric Co.* v. *Lubbers*, 11 Colo. 508; *Lord* v. *Refining Co.* 12 Colo. 393.

All questions of fact were fairly submitted to the jury by the charge of the trial judge. No objection whatever is urged on this appeal against the instructions. The judgment of the District Court must accordingly be affirmed.

Affirmed.

Mr. JUSTICE HAYT, having presided at the trial below, did not participate in this decision.

W. E. WEST v. W. C. HUMPHREY ET AL.

(21 Nevada 80; 25 Pac. 446. Supreme Court. December 18, 1890.)

Contract sale involved with special bill of sale to agent. When a mine by contract sold and agreed to deliver all its ores to a certain ore buyer the fact that as to a particular lot of ore the mine owner subsequently gave a bill of sale to and in the name of the agent of the ore buyer does not make a sale to such agent personally, nor affect the real sale and actual delivery to his principals for whom such agent is acting.

[1]**Delivery complete on loading.** Where under an executory contract for all the ore of a certain mine, made in good faith, a lot of ore is placed on wagons and started for the mill of the ore buyer, the delivery is complete from the time of loading and an attaching creditor takes nothing by his levy.

The freighter is buyers' agent. In such cases the carrier is the agent and bailee of the consignee and not of the shipper.

Appeal from District Court, Nye County; THOMAS H. WELLS, Judge.

D. S. TRUMAN, for appellant.

BENJAMIN CARTER, for respondents.

MURPHY, J. This action was brought to recover certain personal property, consisting of concentrates, or their value.

[1]*Finding* v. *Hartman*, 17 M. R. 333.

A contract to furnish coal on the cars at a particular place is an agreement to deliver the coal there although it was to be weighed at another place. *Watson Coal Co.* v. *James*, 72 Ia. 184; 33 N. W. 622.

Cargo of iron partly unloaded and then reloaded, on carrier learning that the consignee had stopped payment. *Held* that the carrier had not lost his lien. *Crawshay* v. *Eades*, 1 B. & Cr. 181.

After receipt of bill of sale of charcoal in the pits, the buyer put his name on the pits: *Held*, a good delivery. *Tognini* v. *Kyle*, 17 Nev. 209.

Machinery was bought and paid for but left on storage with the vendor who afterwards assigned. *Held*, that delivery was complete. *Oro M. Co.* v. *Starr*, 76 Cal. 166; 18 Pac. 242.

Ore delivered to the mill, its contents to be returned in part in specie to the miner, does not become on delivery, the property of the mill. *Wheeler* v. *Walton Co.* 64 Fed. 664.

The defendants had judgment of non-suit. It appears from the record that W. J. Chamberlain and Frank Dillingham, of Denver, Colo., were partners doing business in buying and smelting ores and concentrates in this state, under the firm name of W. J. Chamberlain & Co.; that W. E. West was their agent in this state, and that as such agent, in the month of September, 1889, he entered into an agreement with J. E. Severance to purchase all the ores and concentrates for Chamberlain & Co. that Severance could produce from the Barcelona mine, which mine Severance was working under a lease. The ores and concentrates were to be delivered to Chamberlain & Co. when loaded on the wagon at the Barcelona mine. Some ores and concentrates had been delivered under the agreement to West. On or about the 20th day of November, 1889, Robert Scott, a teamster and freighter, loaded seven or eight tons, more or less, of concentrates from the Barcelona mine, at the request of Severance, to be by Scott delivered to West at Ledlie; West to pay the freight charges. On the 23d day of November, 1889, West paid Severance $1,200 on the concentrates. On the 25th of November, 1889, and after the said concentrates had been loaded and in transit on Scott's wagons to West, and while Scott was at the town of Belmont, seven miles from where the concentrates had been loaded, the defendant Brougher, as sheriff of the county of Nye, under and by virtue of a writ of attachment sued out in the case of W. C. Humphrey against J. E. Severance, seized the property in dispute as the property of J. E. Severance. The following exhibits were put in evidence by plaintiff:

A. "Belmont, Nev., Nov. 20, '89. This certifies that I have this day sold to W. E. West, manager of the Ledlie Sampling Works, (11) eleven tons of concentrates and ore, (more or less,) now being loaded on Scott's team; consideration ($1,200) twelve hundred dollars. J. E. SEVERANCE.

"Friend West: I think the above is all that is necessary, and all that you require as a bill of sale. I shall leave for Austin on next stage, so you may hold money until my arrival. Yours truly, J. E. SEVERANCE."

B. "Austin, Nev., Nov. 23, '89. Received of W. E. West, Mgr., acct. concentrates in transit, the sum of $1,275 for 11 tons, more or less. J. E. SEVERANCE."

Exhibit C is a bill of sale and assignment from Chamberlain & Co. to West, the plaintiff.

We will not, in this opinion, consider the errors assigned by the counsel for plaintiff to the refusal of the judge to sustain his objections to questions asked the several witnesses. We shall confine ourselves, therefore, to the other error alleged, to-wit, the question of non-suit, for the reason, as assigned by the judge, "that the testimony of the plaintiff did not show that Chamberlain & Co. were the owners of the property in controversy at the time of the levying of the attachment. The bill of exceptions shows that the motion for non-suit, which the judge sustained, was founded upon the theory that the sale of the property under the contract made in the month of September, 1889, between West, acting as the agent for Chamberlain & Co., and Severance, was not a *bona fide* sale of the property, and the bill of sale in evidence, marked 'Exhibit A,' shows that the property in dispute was sold by J. E. Severance to W. E. West November 20, 1889, and that the property was in transit at the time of the sale, and that a portion of the concentrates were not in existence at the time of the pretended sale." We think the non-suit should not have been granted. The testimony of the plaintiff shows that there was an agreement between Severance and the agent of Chamberlain & Co. in the month of September, 1889, whereby all

the ore and concentrates produced from the Barcelona mine were sold to Chamberlain & Co., and were to be delivered to them when loaded on the teams at the Barcelona mines. There had been one or more loads delivered under that agreement, and West testified that all his acts during the entire transaction were for and on behalf of his principals, Chamberlain & Co., and not for himself. Upon this state of facts, and no testimony in the record to contradict them, the mere fact that Severance wrote upon a piece of paper what purported to be a bill of sale to West could not change the original agreement without the consent of West or Chamberlain & Co. The right to rescind was neither exercised nor claimed by either of the parties to the agreement, nor is West's right to act as agent for Chamberlain & Co. questioned; and when he received the paper purporting to be a bill of sale, made in his name, in law it was for the use and benefit of Chamberlain & Co. A person who agrees to act for another is not allowed to deal in the business of the agency for his own benefit; and, if he takes a conveyance in his own name of property which he agrees to purchase for another, he will be considered as holding the property in trust for his principal. The fact that the property was in transit at the date of the paper purporting to be a bill of sale, or that a portion of the property was not in existence at the date of the sale, is of no avail to the respondents.

It appears from the evidence adduced at the hearing that the property was in the possession of the carrier seven miles from the Barcelona mine, and that it had been paid for by West before the levying of the attachment. Such being the case, Severance did not own the property at the date of the levy, without it could be made to appear that he had parted with the property to hinder, delay or defraud his creditors, which question is not before us. The ownership of the property was to pass when loaded on the wagons at the Barcelona mine. The vesting of the title to property always depends

on the intention of the parties, to be derived from the agreement and its circumstances. As long as the ore remained at the Barcelona mine, Chamberlain & Co. had no interest in it; but when the ore was put into sacks, placed in the wagon, delivered to the carrier, and he directed to deliver the property to West, what was up to that time a mere executory contract of sale became an actual or executed sale, and the title to whatever ore was placed in the wagon passed to Chamberlain & Co. "Where the buyer had purchased, in advance, all the crop of peppermint oil to be raised and manufactured by a farmer, the property passed to the buyer in all the oil which had been put by the farmer into the buyer's bottles and weighed, although never delivered to him." *Langton* v. *Higgins*, 4 Hurl. & N. 409. In the case of *Aldridge* v. *Johnson*, reported in 7 El. & Bl. 885, "plaintiff agreed with K. to purchase from K. 100 out of 200 quarters of barley, which plaintiff had seen in bulk and approved of, and he paid part of the price. It was agreed that plaintiff should send sacks for the barley, and that K. should fill the sacks with the barley, take them to a railway, place them upon trucks free of charge and send them to plaintiff. Plaintiff sent sacks enough for a part only of the 100 quarters. These K. filled, and also endeavored to find trucks for them, but was unable to do so. K. finally detained the barley, and emptied it from the sacks back into the bulk. K. having become bankrupt after he had emptied the barley from the sacks into the bulk, and the defendant, his assignee, having removed the whole together, held, by the whole court, that this was a conversion by the assignee as to the part put into the sacks, and the plaintiff should recover that quantity." In cases like the one under consideration, the carrier is the bailee of the person to whom, not by whom, the goods are sent; the latter, in employing the carrier, being considered as the agent of the former for that purpose. Benj. Sales, §§ 181, 693; *Burton* v. *Baird*, 44 Ark. 556; *State* v. *Carl*, 43 Ark. 353; *Her-*

ron v. *State*, 10 S. W. Rep. 26; *Kline* v. *Baker*, 99 Mass. 254; *Schmidt* v. *Nunan*, 63 Cal. 373.

The judgment will be reversed and cause remanded.

BIGELOW, J., (*concurring*). I concur. The plaintiff's evidence shows that the sale of the concentrates was made to Chamberlain & Co. and not to West. West was acting merely as their agent, and, even if the contract of sale had been made in his name, which it was not, it is always permissible to show that it was for the use and benefit of his principals. This was shown here. *Ruiz* v. *Norton*, 4 Cal. 355; *Huntington* v. *Knox*, 7 Cush. 371. As West is the plaintiff, and the one to whom the defendants claim the concentrates were sold, it would make no difference whether sold directly to him, or first to Chamberlain & Co., and then by them to him, were it not that the complaint has specially alleged the deraignment of title through them.

The plaintiff's evidence tended to prove that J. E. Severance had been the owner of the concentrates; that before they were extracted from the mine he had made an agreement to sell them to Chamberlain & Co.; that after they were extracted he made a bill of sale to them, and they had fully paid him for them. This was certainly sufficient to vest the title in them, and authorize them to maintain an action for their possession as against a trespasser or stranger, without regard to whether there was any fraud in the sale or had been any delivery, want of delivery being also one of the grounds upon which the motion for non-suit was made and granted. These questions are only material when the contest is between a purchaser and a creditor of the vendor having a lien by attachment or otherwise. *Thornburgh* v. *Hand*, 7 Cal. 554; Bump, Fraud. Conv. 443, 511. As the defendants had not yet come to their side of the case, there was of course no proof that either of them was a creditor of the vendor, or

that any attachment had been issued, or any attempt made to levy the writ upon the property in dispute. When the motion was made, it only appeared that the title to the property had vested in the plaintiff; that he was consequently entitled to its possession, and that the defendants detained it from him. This certainly made a *prima facie* case. As the case then stood, the defendants were merely strangers and trespassers. Until they had shown some right or interest in the property, it was no concern of theirs whether there was fraud in the sale or had been any delivery, nor could the question be raised. *Packard* v. *Wood*, 4 Gray 307; Benj. Sales, § 675.

JAMES RAY v. WESTERN PENNSYLVANIA NATURAL GAS CO.

(138 Pennsylvania 576; 20 Atl. 1065. Supreme Court. January 5, 1891.)

[1]**Lessee no right to assert forfeiture.** An oil and gas-lease contained a stipulation that the lessee should complete a well within a certain time, or thereafter pay to the lessor certain sums, semi-annually, until such completion; and provided that the lessee's failure to complete said well, or to make such payments, as stipulated, should render the lease null and void and of no effect between the parties. The forfeiture clause being inserted in the interest of the lessor, he had the option, upon a default by the lessee, either to declare the forfeiture or to affirm the continuance of the contract; and when he adopted the latter alternative, the lessee could not set up a forfeiture as a defence to an action in affirmance of the lease.

Re-entry to declare forfeiture, when not necessary. When the lessor, being entitled so to do by the terms of such a lease, remains in possession of the land subject to the rights of the lessee, and the lessee has never taken any possession, a formal re-entry by the lessor, for condition broken, is not requisite to effect a forfeiture, and such occupancy after the breach is not an implied assertion of forfeiture.

Reversing decision after contract made on the faith of it. The law, as declared by a decision of the supreme court, when such decision is not a construction of a statute, does not enter into contracts made thereafter, and the subsequent reversal of the decision does not therefore impair the obligation of contracts in contravention of Const. U. S. Art. 1, § 10.

Appeal from Court of Common Pleas, Washington County.

D. T. WATSON, D. STERRETT, and H. A. MILLER, for appellant.

J. L. GOW, for appellee.

CLARK, J. This appeal is taken from the judgment of the Common Pleas, entered for want of a sufficient affidavit of

[1]See *Bartley* v. *Phillips*, 18 M. R. —, for note of cases on the "null and void" clause, and *Glasgow* v. *Chartiers Co.* 17 M. R. 523. for the cases of exceptional wording allowing lessee to quit.

defense. The action is *assumpsit* to recover certain sums, stipulated in a gas or oil lease, for delay or default in operating the lease. The lease is dated July 7, 1888, James Ray, the party of the first part, being the lessor, and the Western Pennsylvania Natural Gas Company, the party of the second part, the lessee. The lease provides that, in consideration of certain rents and royalties, the said Ray hath granted, demised, and let unto the said company, "for the sole and only purpose of drilling and operating for petroleum oil and gas for the term of two years, or so long thereafter as oil or gas is found in paying quantities, a certain tract of land in Cross Creek Township," etc.; the party of the second part agreeing, in consideration, "to give said first party one-eighth (⅛) of all the oil from wells producing less than fifty barrels per day, and one-fourth (¼) of the oil from all wells producing more than fifty barrels per day;" and, further, "to give $500 per annum for the gas from each and every well drilled," etc., in case the gas is conducted and used off the premises. The particular clause of the contract, upon which suit is brought, is as follows: "The party of the second part agrees to pay, within ten days from the execution of this lease, the sum of fifty-three dollars, and, if a well is not completed within six months from the execution of this lease, the said second party agrees to pay a further sum of fifty-three dollars, and so on continually every six months, during the continuance of the term herein specified. The said sum of $500 gas rent shall be paid within one month from the time said well is completed on said premises, and to be paid annually, in advance, thereafter. It is further agreed by said second party that, if a well is not completed within fifteen months from the date of this lease, they are to pay a further sum of $250, said sum to be a credit on the well when drilled, and, in case of failure to complete one well within such time, the party of the second part hereby agrees to pay thereafter to party of the first part, for any future delay, the sum of

one hundred and six dollars per annum, within one month after the time for completing such well, as above specified, payable, semi-annually, at the First National Bank of Washington, Pa.; and the party of the first part hereby agrees to accept such sum as full consideration and payment for such yearly delay, until one well shall be completed. And a failure to complete one well, or to make any such payment within such time and such place, as above mentioned, shall render this lease null and void, and to remain without effect between the two parties." The plaintiff's statement averred that the defendant had never completed a well on the demised premises, and claimed to receive $53, due January 7, 1889; $53, due July 7, 1889; $250, due October 7, 1889; and $53, due January 7, 1890.

The affidavit of defense set forth, in substance, that, by the terms of the lease, the only right granted was the right to operate for gas or oil; that the defendant never entered into the possession for this purpose, while the plaintiff not only at the time of the lease, but when the several sums sued for became due, respectively, was and still is in possession of the land described in the lease, and that, under these circumstances and according to the law as declared in the decisions of this court, the lease, by its terms, on the defendant's failure to put down one well, or to make any one of the payments specified, became *ipso facto* null and void, without re-entry; and that, therefore, there is now no liability upon the part of the defendant either to pay or to perform.

The case is in all respects governed by our decision in *Wills* v. *Gas Co.* 130 Pa. St. 222; 18 Atl. 721. It is true the lessor's possession was not alluded to in the discussion and decision of that case, nor do we regard the question whether or not he was in possession, subject to the lease, as a matter of any great significance. We agree with the appellant in its contention that if, in such a case as this, the lessor should choose to avail himself of the forfeiture clause in his

contract, a formal re-entry, to take advantage of the breach, was not required. The authorities cited by the appellant are decisive of the question. In *Hamilton* v. *Elliot*, 5 Serg. & R. 375, there was a conveyance of a freehold by A. to B., upon certain conditions, which were not complied with, the grantor, in accordance with the terms of the grant, remaining in the possession from the time of conveyance until after the forfeiture accrued; and it was held in a suit by the assignee of A. that, by reason of the breach of the condition, while A. was in actual possession, the estate revested in A. without a formal entry, to take advantage of the breach or notice of the non-performance of the condition. As the grantor was already in possession, it was deemed unnecessary that he should go out in order that he might re-enter, or that the grantee should have formal notice of what he already knew, viz., that the condition was not performed. To the same effect are the other cases cited by the appellant: *Dickey* v. *McCullough*, 2 Watts & S. 99; *Feather* v. *Strohoecker*, 3 Pen. & W. 508; and *Bear* v. *Whisler*, 7 Watts 149. The same rule has been applied to leases for years. *Kenrich* v. *Smick*, 7 Watts & S. 41; *Sheaffer* v. *Sheaffer*, 37 Pa. St. 525; *Davis* v. *Moss*, 38 Pa. St. 346; *Brown* v. *Bennett*, 75 Pa. St. 420; *Brown* v. *Vandegrift*, 80 Pa. St. 142; and *Munroe* v. *Armstrong*, 96 Pa. St. 307. But as, by the terms of the lease, Ray, the plaintiff, was entitled to remain in possession of the land, subject to the right of the company to drill and operate for oil and gas, his occupancy of the land at and after the time of the breach can be of little consequence, unless by some act in assertion of the forfeiture he gave it a greater effect. It was certainly not necessary that he should abandon the possession to which, by the very terms of his contract, he was entitled, in order that he might insist upon performance by the lessee. The lessor's election to forfeit, while he is in the actual possession, may be regarded as a constructive entry under his title.

But is is said that the doctrine declared in *Willis* v. *Gas Co. supra*, is an innovation or change in the law; that the parties must be presumed to have contracted in view of the general law, as it was expounded when their engagements were formed, and to determine the legal effect of the contract otherwise is to impair its obligation, in contravention of the tenth section of the first article of the federal constitution. In *Kenrich* v. *Smick*, *supra*, and in *Sheaffer* v. *Sheaffer*, *supra*, although the condition, in each case, was inserted in the interest of the lessor, it was held that, upon breach of the condition by the lessee, the lease was, *ipso facto*, absolutely void, without re-entry, and could not afterwards be affirmed or continued by any subsequent recognition of the tenancy on part of the lessor, or by any act of his, other than the making of a new lease. But, as we said in *Wills* v. *Gas Co. supra*, the rigor of the rule was relaxed in *Davis* v. *Moss*, 38 Pa. St. 346, where the forfeiture was said to depend upon the terms of the instrument, "unless there be evidence to affect the landlord with a waiver of the breach, like the receipt of rent, or other equally unequivocal act," in which case the lease may be continued at the instance of the lessee. The ruling in *Davis* v. *Moss*, *supra*, was the first step in the transition from the doctrine of *Kenrich* v. *Smick*, *supra*, to the now well-settled rule laid down in *Galey* v. *Kellerman*, 123 Pa. St. 491; 16 Atl. 474, and *Wills* v. *Gas Co. supra*, where the principle is established that, where the condition appears to have been inserted solely in the interest of the lessor, the lease is void upon the breach, if the lessor, by some positive act, elects to take advantage of it. The departure from *Davis* v. *Moss*, *supra*, is greater, perhaps, than the reasoning in the case last cited would seem to indicate, but it was taken, on due deliberation and careful study of the principles involved, and we are not inclined to recede from the position assumed. It is a somewhat significant fact that in all the cases cited, including *Davis* v. *Moss*, *supra*, the forfeiture

was set up by the lessor, in whose interest the condition was inserted, upon the default of the lessee; in none of them, as in the case at bar, did the lessee set up his own default as a cause of forfeiture. No case has been brought to our notice in which the lessee was allowed to take advantage of his own wrong, or to set up his own default, to work a forfeiture of his own contract. It must be conceded, however, that, if the old rule is the right one, this anomalous result must ensue. Persons may perhaps contract expressly in this form, and to this effect. When they do, the transaction amounts to a mere option, and the lessee, in setting up his own default, simply avails himself of an elective right secured to him in his contract. We do not understand the contract in suit to be of this character. The clear purpose of the lessor was to have his land operated for oil or gas, and the condition was inserted for his benefit. While the obligation on part of the lessee to operate is not expressed in so many words, it arises by necessary implication. The lease was for the expressed purpose of drilling and boring for oil or gas, the lessor, in a certain event, to receive a share of the production as a royalty, or rent; and, in another event, to be paid $500 per annum for each gas-well, the product of which was conducted from the land for consumption. If a farm is leased for farming purposes, the lessee to deliver to the lessor a share of the crops, in the nature of rent, it would be absurd to say, because there was no express engagement to farm, that the lessee was under no obligation to cultivate the land; an engagement to farm in a proper manner and to a reasonable extent, is necessarily implied. The clear purpose of the parties to this lease was to have the lands developed, and the half-yearly payments, and the other sums stipulated, were intended not only to spur the operator, but to compensate Ray for the operator's delay or default. The lessor's hands have been tied for two years. We do not know that he lost anything in royalties, or that he

suffered by drainage, for the territory might have proved unproductive; but, as the transaction was founded in the hopes that either oil or gas, or both, might be found in paying quantities, it was competent for the parties to contract in advance for the amount of compensation to which, in the event of delay or default in development, the lessor would be entitled. The provision for forfeiture was doubtless inserted in anticipation that the lessee might make default, and become unable to pay, in which event he might put an end to the lessee's pretensions, and seek other means of development. This clause having been inserted as a protection to the lessor, he had the right either to declare the forfeiture or to affirm the continuance of the contract, and, if the lessor did not choose to avail himself of the forfeiture, the lessee cannot set it up as a defense to an action in affirmance of the contract. *Galey* v. *Kellerman, supra; Wills* v. *Gas Co. supra.*

The courts of highest authority of all of the states, and of the United States, are not infrequently constrained to change their rulings upon the questions of the highest importance. In so doing the doctrine is not that the law is changed, but that the court was mistaken in its former decision, and that the law is, and really always was, as it is expounded in the later decision upon the subject. The members of the judiciary in no proper sense can be said to make or change the law. They simply expound and apply it to individual cases. To this general doctrine there is a well-established exception, as follows: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in effect on contracts as an amendment of the law by means of a legislative enactment." *Douglass* v. *County of Pike*, 101 U. S. 677. See, also, *Anderson* v. *Santa Anna*, 116 U. S. 361; 6 Sup. Ct. Rep. 413, and cases there cited;

Cooley, Const. Lim. 474–477. To this effect and no more we understand to be the cases of *Insurance Co.* v. *Debolt*, 16 How. 432; *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Havemeyer* v. *Iowa Co.* 3 Wall. 294; and *Olcott* v. *Supervisor*, 16 Wall. 678. In *Insurance Co.* v. *Debolt*, *supra*, the doctrine is thus stated: "The sound and true rule is that if a contract, when made, was valid by the laws of the state, as then expounded by all the departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent acts of the legislature, or the decision of its courts altering the construction of the law." The ruling applies, it will be observed, not to the general law, common to all the states, but to the laws of the state "as expounded by all the departments of its government;" and it is held that contracts valid by these laws may not be impaired, "either by subsequent legislation or by the decisions of its courts altering their construction." The reference is, of course, to the statute law. In *New Orleans Water-Works Co.* v. *Louisiana, etc.* 125 U. S. 18; 8 Sup. Ct. Rep. 741, the law on the subject is stated as follows: "In order to come within the provision of the constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of a state, and not at the decisions of its courts, or the acts of administrative or executive boards, or officers, or the doings of corporations or individuals. This court, therefore, has no jurisdiction to review a judgment of the highest court of a state, on the ground that the obligation of a contract has been impaired, unless some legislative act of the state has been upheld by the judgment sought to be reviewed." "We are not authorized by the judiciary act," says Mr. Justice Miller in *Knox* v. *Bank*, 12 Wall. 383, "to review the judgments of the state courts, because their

judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, when the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held." To bring the case within this provision of the federal constitution, it must be the constitution, or a statute, or some enactment that has the force of law, either of the state or of some municipality exercising legislative power delegated by the state, which impairs the obligation of a contract. *Williams* v. *Bruffy*, 96 U. S. 176–183; *U. S.* v. *New Orleans*, 98 U. S. 381–392; *Murray* v. *Charleston*, 96 U. S. 432–440; *Meriweather* v. *Garret*, 102 U. S. 472. In the very recent case of *Water Co.* v. *Easton*, 121 U. S. 388; 7 Sup. Ct. Rep. 916, Mr. Justice Harlan says: "The state court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold the contract void which in our opinion is valid; it may adjudge a contract to be valid which in our opinoin is void; or its interpretation of the contract may in our opinion be radically wrong; but in neither of such cases would the judgment be reviewable by this court, under the clause of the constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment, in terms, or by its necessary operation, gives effect to some provision of the state constitution, or some legislative enactment of the state, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question." The affidavit, in our opinion, is insufficient, and the judgment was rightly entered.

Judgment affirmed.

NANNIE R. COLLINS v. CHARTIERS VALLEY GAS CO.

(139 Pennsylvania 111; 21 Atl. 147. Supreme Court. January 8, 1891.)

[1]**Well destroyed by salt water from oil drilling.** One who bores for oil or gas is responsible for an injury to a neighboring water well, arising from the commingling by his well of salt and fresh waters percolating underground, where such injury was plainly to be anticipated, and was preventable by the exercise of reasonable care at a reasonable cost.

Proper precautions would have prevented. The defendant is liable, in such case, not because, in the exercise of his own legal right, he has necessarily injured the plaintiff, but because he has injured him unnecessarily, by his neglect to adopt such reasonable precautions as might and should have been taken to protect him.

Appeal from Court of Common Pleas, Allegheny County.

Action for trespass for damages sustained from the loss of a well of water in consequence of a natural gas well in the vicinity. Suit was brought in February, 1888. At the trial on May 7, 1889, verdict for defendant, and September 6, 1889, after the discharge of a rule for a new trial, judgment was entered thereon. On appeal of plaintiff the case was removed to the Supreme Court, where the *venire facias de novo* was awarded. 131 Pa. 143; 18 Atl. 1012. On a retrial on February 12, 1890, there was a verdict for plaintiff for $800, on

[1]A quarry working tapped a spring but the spring broke out at another place close by; *Held* no cause of action except for damage, if any by changing the site of the spring. *Chamberlain* v. *B. & O. R. Co.* 66 Md. 518; 8 Atl. 267.

Springs cannot be appropriated when their streams have already been taken up. *Malad Val. Co* v *Campbell*, (Idaho) 18 Pac. 52.

Water derived from drainage is not a natural stream and is not subject to appropriation. *Cardelli* v. *Comstock*, (Nev.) 66 Pac. 950.

A person may lawfully dig a well on his own land, though thereby he destroys the subterranean, undefined, percolating water supplying his neighbor's spring. *Crescent M. Co* v. *Silver King M. Co.* 17 Utah 444; 54 Pac. 244.

which, after discharge of rule for new trial, defendant appealed.

JOHN M. KENNEDY and JAMES C. DOTY, for appellant.

YOUNG & TRENT, for appellee.

WILLIAMS, J. A statement of the facts of this case is necessary to a correct understanding of the question presented by it. The appellant company is engaged in the production and sale of natural gas. In the prosecution of this business it secured a lease, for gas purposes, of the Mueller farm, and drilled one or more wells upon it. The stratum in which gas is looked for in that region is about 2,000 feet below the surface of the upland, and 300 to 400 feet less in the narrow valley of Kilbuck run. The borough of Glenfield is situated in this valley, and the well complained of was within the borough limits, and within a short distance of the dwellings of several of the inhabitants. The evidence shows that the geological formation in that neighborhood is sufficiently uniform so that veins of fresh water are encountered at about the same relative depth from the surface, and veins of salt water at a tolerably uniform distance below the fresh water. These veins of water are ordinarily found in a stratum of gravel or loose rock lying on a stratum of clay, slate, or other hard substance impervious to water, which forms a bed or floor over which the water spreads in its stratum of gravel or rock until it finds its way to the surface. In places where a crevice or channel exists in the rock, the water naturally gathers into it, and thus an occasional subterranean stream may be formed; but ordinarily the water is found diffused through the loose material overlaying the floor of the water vein or stratum, and when this is penetrated by the drill the water gathers in the opening thus made. To facilitate the work of drilling it is desirable to prevent

the water from flowing into the well. This is done, as soon as the fresh-water veins have been passed by the drill, by inserting an iron casing extending from the surface to a point a few feet below the lowest vein. This allows the water to move in its bed just as freely as before the well was drilled, without the least interference with its volume, direction, or quality. When the fresh water is thus shut off, the work of drilling is continued until the salt-water veins are passed, when a similar method is resorted to for shutting that out of the well. After this is done the oil or gas bearing rock is penetrated, and the well completed. If the well is successful the product can be secured at once undisturbed by either the salt water or the fresh, as both are effectually cased out. If this process is properly conducted, the veins of water, both salt and fresh, are left to move, percolate, or flow as before, neither interfering with the well nor with each other. The defendant began the work of drilling the well complained of, with full knowledge of the general geological formation, and with ample practical experience in the management of the water veins; but while the company shut the water out of its own well, it did not separate the salt from the fresh, but left it to mingle with the fresh, and flow through the fresh-water veins into the wells in the neighborhood, and destroy them. Mr. Hummel, the contractor, testified that the salt water could be kept from the fresh by casing at an expense of about $250 per well, and by the use of a device called a "packer" at a much less cost. He also said, what it is very evident must be so, that when the salt water is allowed to mingle with the fresh it will "spoil the whole neighborhood." The wells of these plaintiffs were so near the gas-wells that their danger was evident. Hummel was asked: "You knew if you allowed the salt water to mingle with the fresh that it would destroy these wells?" and he answered: "Certainly I know that. I've had that occur often." When asked why he did not shut the salt water

off from the fresh, he replied: "Well, because I was not instructed to do so. My contract did not read that way."

Now, upon the facts of this case, it is evident that our question does not relate to the right of an owner of land to use it or to develop its resources in a lawful and proper manner. Such right may as a general proposition be conceded. If the owner or lessee of the Mueller farm had dug a well upon it, and the water percolating the soil had collected in it, leaving some neighboring well or wells dry, the owner, being in the exercise of a legal right in the usual and proper manner, would not be liable to his neighbor for the loss of his well. If the farm was underlaid with coal or other mineral, and, as a consequence of mining in the usual and proper manner, the movement of the water in the soil or gravel should be arrested so that it should find its way into the mine to the injury of the owners of wells and springs in the neighborhood, no action would lie against the owner of the mine. *Wheatley* v. *Baugh*, 25 Pa. St. 528; *Haldeman* v. *Bruckhart*, 45 Pa. St. 514. If, in raising the mine water to the surface for purposes of drainage, a surface stream is corrupted and rendered unfit for use, those affected thereby cannot recover damages. *Coal Co.* v. *Sanderson*, 113 Pa. St. 136; 6 Atl. 453. The question in this case relates not to the right but to the manner of its exercise. The defendant had a right to drill in search of natural gas, but it was bound to exercise this right in a reasonable manner, and with due regard to the rights of others. In its search for gas it had to drill through nearly 2,000 feet of the earth's crust with its successive layers or *strata* of rock, gravel, slate, and other substances, and their veins of water, fresh and salt. In the ordinary course of drilling, these veins of water had to be cased out of the well, and the jury have found on abundant evidence that at a small additional expense, by a process well known and easily applied, and in more or less frequent use throughout the oil and gas districts of Penn-

sylvania, they might have been kept from mingling, and the wells in the neighborhood saved thereby. If so, then the maxim *sic utere tuo ut alienum non laedas* applies, and the defendant is liable, not because it has necessarily injured the plaintiffs in the exercise of its own legal right, but because it has injured them unnecessarily by the neglect of such reasonable precautions as might and should have been taken to protect them. According to the testimony, this gas well was drilled with the knowledge of the fact that salt water was to be encountered; that it could be confined to its own bed; that, if it was not, the "whole neighborhood would be spoiled;" and that there were many wells near by in the borough of Glenfield to be affected by their care or want of it in this particular. Yet no effort whatever was made to shut off the salt water, or to avoid the destruction of the wells which it was practicable to save. The ground of the defendant's liability is negligence,—the want of reasonable care, under the circumstances, for the rights of others. This was plainly ruled when the case was here one year ago. *Collins* v. *Gas Co.* 131 Pa. St. 143; 18 Atl. 1012. We then said if the injury was plainly to be anticipated, and was easily prevented by the exercise of reasonable care at a reasonable cost, the plaintiff was within the exception recognized in all the cases from *Wheatley* v. *Baugh* down to the present time, and was entitled to recover. The court below was right in the application of this doctrine, and the *judgment must be affirmed.*

TECUMSEH IRON CO. v. CARRIE CAMP ET AL.

(93 Alabama 572; 9 So. 343. Supreme Court. March 19, 1891.)

[1]**Hostile title involved.** Equity will not entertain a bill for an account against an alleged co-tenant who has been removing ores from the premises when he claims under a hostile title and denies the plaintiff's ownership.

A court of equity has no jurisdiction to try a title at law, and it will not treat the account as an incident when it has no jurisdiction over the principal thing.

The instances stated in which equity entertains bills for accounting.

Appeal from Chancery Court, Cherokee County: S. K. McSpadden, Chancellor.

Bill by Carrie Camp and others against the Tecumseh Iron Company. Defendant demurred, and moved to dismiss the bill. Both the motion and the demurrer were overruled, and defendant appeals.

[1]*Duncan* v. *Holidaysburg Iron Works*, 136 Pa. 478; 20 Atl. 647. *Frisbees App.* 14 M. R. 344.

Instance of a mine turned over to creditors to work out its debts with consideration of what items are allowable on the final accounting. *Adams* v. *Lambard*, 80 Cal. 426; 22 Pac. 180.

An accounting of work done and gold got may be required of a working co-tenant. *Hawkins* v. *Spokane Co.* (Idaho) 28 Pac. 433; 33 Pac. 40.

Separate actions for account and injunction need not be brought. *Cons. Wyoming Co.* v. *Champion Co.* 63 Fed. 540.

Smelter holding proceeds of ores till ownership settled, required to pay interest on the deposit. *Boston Co.* v. *Reed*, 23 Colo. 523; 48 Pac. 515.

Expenditures on a mine are not necessarily improvements, they may be a damage. *Bacon* v. *Thornton*, 16 Utah 138; 51 Pac. 153.

Measure of damages in accounting between dowager and her co-owners is the value in place. *McGowan* v. *Bailey*, 179 Pa. 470; 36 Atl. 325.

Definition of profits. *Poterie Co.* v. *Poterie*, 179 Pa. 68; 36 Atl. 232.

Co-tenants must account for profits—not for rental value. *Williamson* v. *Jones*, 43 W. Va. 562; 27 S. E. 411.

Net proceeds of ore, how ascertained. *Yank* v. *Bordeaux*, 23 Mont. 205; 58 Pac. 42.

TOMPKINS & TROY, for appellant.

COLEMAN, J. The purpose of the bill is to have an account stated between plaintiffs and defendant, and to charge defendant with one-half the iron ore mined and moved, from the 40 acres of land described in the bill, to defendant's furnace. Plaintiffs claim to own an undivided half interest in the land under the will of their father, which is made an exhibit to the bill, and aver that their father owned a half interest in the land at the time of his death. The bill also avers that defendant has mined and moved 400,000 tons of ore, of the value of $40,000. The bill avers "that said Tecumseh Iron Company has been in possession of said land, as complainants are informed, believe, state and charge, under and by a purchase from Geo. W. Alexander, and complainants insist, state and charge that Geo. W. Alexander had no interest in said land, and therefore had no authority, right or power to sell or convey said land to the said The Tecumseh Iron Co., as he never did have any right or interest in said land; and if any sale was ever made by Geo. W., or him and his wife, it was wholly void, so far as such sale affected complainants."

The prayer of the bill is for an account and general relief, and does not ask for any special relief as to title; neither is the bill one seeking partition of the land. *McEvoy* v. *Leonard*, 89 Ala. 457, 460; 8 South. Rep. 40; *McMath* v. *De Bardelaben*, 75 Ala. 68.

Life tenant has a right to receiver in nature of an auditor to see that she gets her fraction of produce of oil wells. *Higgins Co.* v. *Snow*, 113 Fed. 433.

Measure of damages between tenants in common where one has removed coal from joint premises, including compensation for right of way over individual property. *Cecil* v. *Clark*, 47 W. Va. 402; 39 S. E. 202.

A co-tenant quarrying stone from the common property must account to his co-owners. *Cosgriff* v. *Dewey*, 47 N. Y. Sup. 255; 164 N. Y. 1; 58 N. E. 1.

If the averments of the bill are true, the defendant is in possession as a trespasser, claiming the right to the land under a purchase from one George W. Alexander, who the bill avers had no title or interest in the same. Leaving out of consideration for the present all other questions, before the court could proceed to order an account, and hold defendant responsible for the iron ore, it must necessarily determine the disputed question of titles to the land. A party cannot accomplish indirectly by bill in chancery that which cannot be done directly. The rule that courts of equity having jurisdiction for one purpose will proceed to settle all matters germane to the disputed question cannot be invoked in cases where the equitable jurisdiction of the court cannot be exercised until it judicially determines a question of which it has no equitable jurisdiction. To hold otherwise would be to declare that the unauthorized assumption of jurisdiction by the court is legalized by the exercise of the assumed jurisdiction. Many cases arise where parties are entitled to equitable relief, and for complete justice, and to prevent multiplicity of suits, the court, having jurisdiction to administer the equitable relief, will adjudicate many questions purely legal. In all such cases the equitable jurisdiction was independent of the questions which were of a purely legal character. A court of chancery has no original jurisdiction to try suits in ejectment, or settle questions of adverse titles resting upon different and disputed facts. *Fielder* v. *Childs*, 73 Ala. 574; *Randle* v. *Boyd*, Id. 287; *McMath* v. *De Bardelaben*, 75 Ala. 68; *Tyson* v. *Brown*, 64 Ala. 244; *Curry* v. *Peebles*, 83 Ala. 225; 3 South. Rep. 622; *Hambrich* v. *Russel*, 86 Ala. 201, 5 South. Rep. 298; *Foster* v. *Winchester*, 92 Ala. 407; 9 South. Rep. 83; *McEvoy* v. *Leonard*, *supra*; *Mining Co.* v. *Hale*, 93 Ala. 542.

One tenant in common may under certain conditions maintain assumpsit against his co-tenant. Whether the averments of the present bill bring the case within the rule, *quere*. *Fielder* v. *Childs*, *supra*; *Strother* v. *Butler*, 17 Ala.

733; *Pike* v. *Bright*, 29 Ala. 332; *Fuller* v. *Duren*, 36 Ala. 73; *Malone* v. *Hundley*, 52 Ala. 149. The bill seeks no discovery of the defendant; neither are the averments of the bill sufficient to show a mutuality of indebtedness or any complication of accounts. As was held in *Avery* v. *Ware*, 58 Ala. 475, it is not every matter of account of which a court of equity takes jurisdiction. There must be a fiduciary relation between the parties, or mutuality or complication of accounts to justify the intervention of a court of equity. Where the accounts are all on one side, where the demands are purely legal, and the amount ascertainable by a simple calculation, the remedy at law is adequate. *Knotts* v. *Tarver*, 8 Ala. 743; *Dickinson* v. *Lewis*, 34 Ala. 638; *Crothers* v. *Lee*, 29 Ala. 337; *Kirkman* v. *Vanlier*, 7 Ala. 217. Equity jurisdiction in matters of account is exercised only where some special cause is alleged, as where the accounts are intricate, or discovery prayed, or some other ground peculiar to equity exists. *Jewett* v. *Bowman*, 29 N. J. Eq. 174. An accounting is always ordered in a court of equity where it is an incident to some other relief, but, where an accounting is the only ground of equitable intervention, there should be some averment of facts to show that a complete remedy cannot be had in a court of law, or some fact peculiar to a court of equity. 6 Amer. & Eng. Enc. Law, p. 720; authorities *supra*.

Reversed and remanded.

ARMSTRONG v. AUEN.

(21 Pittsburgh Leg. J. 395. Common Pleas of Allegheny County, Pennsylvania. May. 2, 1891.)

[1]**Boring well through worked out coal seam. Anticipation of Danger.** Plaintiff owned the coal under a certain tract, a portion of which had been worked out. Defendant, the surface owner, or lessee of the surface owner, was about to drill an oil well through the worked out seam of coal. *Held*, that the danger was obvious of the escape of oil or gas through the open seam to those still mining for the ungotten coal. But that by proper precautions such danger could be averted and that the injunction be dissolved upon defendant's showing that such precautions had been taken.

Application to dissolve injunction.

A bill in equity was filed by Armstrong, plaintiff, setting forth that he was the owner of certain adjoining coal lands,

[1]Ownership of space of worked out seam. *Lillibridge* v. *Lackawanna Co.* 17 M. R. 412.

Injunction granted against surface owner in favor of the owner of the reserved minerals against sinking a bore hole through the space of a worked out coal bed. *Johnstone* v. *Crompton*, L. R. 2 Ch. D. (1899) 190.

A possible accident (breaking of pumps which would drown a mine) is not to be anticipated and considered as grounds for injunctive relief. *Genet* v. *Delaware Canal Co.* 122 N. Y. 505; 25 N. E. 922.

No preliminary injunction against boring gas well through worked out coal-beds, or presumable underlying untouched seam. Contradictory affidavits in such cases as to danger of explosion from escaping gas. *Rend* v. *Venture Oil Co.* 48 Fed. 248.

Consideration of facts upon which courts should allow or disallow injunctions against hydraulic mines whose owners have built impounding dams. *U. S.* v. *North B. Co.* 53 Fed. 625. *U. S.* v. *Lawrence*, 53 Fed. 632.

Passing through underground ways not enjoined. *Boston Co.* v. *Montana Co.* 23 Mont. 557; 59 Pac. 919.

Refused to compel owner to plug well from which he was allowing the gas to go to waste. *Hague* v. *Wheeler*, 157 Pa. 324; 27 Atl. 714.

Shooting torpedo in gas well in city, enjoined. *Tyner* v. *People's Gas Co.* 131 Ind. 408; 31 N. E. 61.

Where an upper mill has been floating tailings but is taking measures to prevent it plaintiff is not entitled to injunction against future injury. *Otaheite Co.* v. *Dean*, 102 Fed. 929.

aggregating some 700 acres, including 150 acres known as the Fryer tract, out of which 180 acres, including 50 of the Fryer tract, were worked out, and that through the worked-out portion of the Fryer tract a gas or oil well was about to be drilled by defendants, exposing plaintiff's mining property and the lives of his employees to danger from escaping gas or oil.

No claim was made that the plaintiff enjoyed any privileges in the mining of his coal in the Fryer tract other than those arising under a conveyance in fee-simple for "all the coal under" said tract.

Upon April 16, 1891, an injunction was granted upon application, pending hearing, and May 2d the following opinion filed:

For plaintiff, JAMES F. ROBB, Esq.

For defendants, Messrs. HAYS & NOBLE.

Opinion by STOWE, P. J.

In the attempt to sink an oil well through a portion of the abandoned works of plantiff, it is clear that defendants are not about to interfere with any rights of plaintiff of which he has any rights to complain, unless it be made apparent that the sinking of the well will result in such substantial injury or manifest danger to plaintiff's rights as cannot be compensated by damages. So far as injury merely to the coal or mining rights of plaintiff is concerned, it is obvious that there is no appreciable damages to plaintiff's property threatened or involved. As soon as plaintiff removed the coal, his right in that portion of the works terminated, except so far as was ordinarily proper and necessary for mining and removing the residue of the coal under the special tract purchased from those under whom defendants claim title. It

is admitted that plaintiff has taken all the coal he desired to remove from the part of the mine where it is proposed to bore one of the wells, and that such part of the mine has been abandoned and the roof allowed to fall in, and it is apparent that the well itself when finished will not interfere with any of the rights belonging to plaintiff by reason of his ownership of the coal, and it necessarily follows that he has no right to an injunction, *unless* he can show some other reason than such as might arise from an interference with his rights of property by the boring of the proposed well.

But it is alleged that the boring of this well will under the circumstances create such palpable danger by reason of its allowing or causing oil or gas, or both, to escape in the workings of plaintiff's mine, as not only incidentally to endanger the mine itself, but also the lives of the workmen employed in and about the mine. It cannot be questioned that such a danger may exist, and that if oil or gas shall escape from the well into plaintiff's mine it may result in great destruction of property and perhaps loss of life, and consequently no well should be allowed to be bored unless it is made to appear that the same can be so protected as to take away all reasonable probability that either oil or gas will get into the mine. It will devolve upon defendants to take much more than ordinary means of safety and to use such appliances as will render it certainly safe so far as human foresight and experience can anticipate that no danger shall arise by oil or gas thus escaping. Now can this be done?

If it cannot we must grant the injunction. If it can we can see no reason for pursuing such a course. Ordinarily it is the duty of the plaintiff to satisfy the court, before an injunction will be allowed, that danger to himself or others will arise from the use of lawful agencies by others, but under the facts in evidence we think defendants should satisfy the court, by sufficient proof, that the use of mechanical appliances will guard against any reasonably probable danger in

the boring and use of this well. If this is done we cannot say that defendants should be enjoined from prosecuting their contemplated work. Upon this question the evidence satisfies us that all danger to the mines and its workmen can be avoided by mechanical means, and as the case now stands the affidavits sufficiently show that the methods proposed by defendants are entirely sufficient. While we are not unmindful of the possible danger to life, courts can only be governed by the evidence before them and must draw their conclusions from it. Equity will not prohibit one from conducting a legitimate business which is not necessarily a nuisance, and as we deem it sufficiently shown that the boring of this well need not be necessarily dangerous to plaintiff's mining operations, but on the contrary may be made entirely safe by the use of proper means and appliances, the injunction granted will now be conditionally dissolved.

It is now ordered that the injunction heretofore granted be dissolved as to the well projected through the worked-out portion of plaintiff's mine (the injunction as to the other well to remain till further order,) provided the defendants immediately proceed in the manner indicated by the affidavits of R. L. McCully, J. W. Patterson and Augustin Steiner, filed in this case, to bore and secure by casing, etc., the said well so that neither gas nor oil can escape therefrom into plaintiff's mine. The plaintiff is also allowed to hereafter apply to have a commissioner appointed to take testimony in reference to the sufficiency of the means used for that purpose in case he sees fit to do so. Decree to be prepared by counsel.

LESTER DRAKE ET AL. v. GILPIN COUNTY MINING CO.

(16 Colorado 231; 27 Pac. 708. Supreme Court. June 18, 1891.)

[1]**Facts of the case. Complainant seeking equity must do equity.** The vendor of 50 feet on a lode claim brought suit to compel completion of the purchase. He got judgment for the agreed price and was to deposit deed to the defendants. He found nothing clear on which to levy. He brought suit to set aside a certain trust deed in favor of his judgment. In the meantime on failure by either side to represent the ground he caused it to be jumped for his benefit. *Held*, that such action destroyed his status in a court of equity.

Vendor defeating his own title. One invested with possessory title to a mining claim, and who, in pursuance of a contract of sale thereof, executes and places in escrow a deed to the purchaser, with covenants of warranty against all adverse claims and incumbrances, except as against the United States, cannot lawfully himself acquire an adverse claim thereto, while seeking to enforce the collection of the purchase-money, by judgment against the purchaser.

Neglect by Vendee to do annual labor. The neglect of the grantee to comply with the mining laws of the government, by reason of which its possessory rights were liable to forfeiture, gave its grantor no right to enter and acquire an adverse title to the claim; such conduct being both a breach of faith with his grantee, and a violation of his covenants.

One seeking to destroy the very title he has contracted to convey will not be assisted by a court of equity to collect the purchase-money therefor out of other property of the grantee by subordinating the valid claims of third parties to the payment of such purchase-money.

Error to District Court of Arapahoe County.

Mr. L. C. ROCKWELL and Messrs. TELLER & ORAHOOD, for plaintiffs in error.

[1]Compare *McDermott Co.* v. *McDermott*, (Mont.) 69 Pac. 715, on similar but distinguishable facts.

Where a mine owner claims that sundry parties are working on the dip of his vein under various locations below, all may be joined as defendants in a bill of peace. *Hyman* v. *Wheeler*, 33 Fed. 629.

Equity will not enjoin mining where the right depends on matters which can only be asserted in a court of law. *Duncan* v. *Holidaysburg Iron Works*, 136 Pa. 478; 20 Atl. 647.

Mr. L. B. FRANCE, for defendants in error.

RICHMOND, C. In April, 1879, Lester Drake was interested as owner in the Williams lode, situated in Gilpin County. The extent of such interest is immaterial, as he held contracts with the other owners giving him the right, for the time being, to sell the entire property. The plaintiff had been unsuccessful in his efforts to make such sale until he met defendants Weitbrec and Cooper. He was then in embarrassed circumstances, and the time of these options was about to expire when the negotiations with these defendants were entered upon. Upon the last day he succeeded in making a contract with them whereby they were to take six hundred feet of the property and pay therefor the sum of $36,500. About this time the defendants Weitbrec and Cooper, with one Parker, organized a corporation known as the Gilpin County Mining Company, in whose name the negotiations were finally consummated, although it is claimed that it was a personal enterprise on the part of Weitbrec and Cooper, with which the company had nothing whatever to do. The title to fifty feet of the six hundred being in dispute, it was arranged that the sale should be completed without regard to that portion of the claim. A separate agreement in writing was executed as to this, wherein the price to be paid therefor, was fixed at $2,500. This amount was made payable on the 15th of September, 1880, or as soon as a good and sufficient title thereto could be furnished, Drake agreeing to furnish such title with covenants of warranty, except as against the United States. The price agreed upon for the five hundred and fifty feet was $34,000. This sum was paid as follows: Company stock for the corporation, for which Drake received in cash from Weitbrec and Cooper, $7,500; the notes of the company for $20,500, which were paid by Weitbrec and Cooper, and the assumption by the company of the payment of a note of plaintiff for $6,000. Some of

these notes were secured by a trust-deed upon the property. This part of the transaction seems to have been fully closed at the time and a deed executed and delivered to the company for the five hundred and fifty feet by Drake.

In the year 1881, Drake, claiming to have secured the title to the remaining fifty feet, tendered a deed to the company for the same and demanded the $2,500 agreed to be paid thereafter. The company claiming some misrepresentation in reference to the property, declined to accept the deed and refused to pay the money. Thereupon Mr. Drake brought suit for this amount with interest. In that suit he obtained judgment against the company and caused an execution to be issued and levied upon the mining property, theretofore transferred by him to the company, but made no further attempt to satisfy the writ until the institution of the present action. Some of the notes given in part payment of the original purchase price falling due in the meantime, Weitbrec and Cooper caused the property to be advertised for sale by the trustee. Drake thereupon instituted this suit to restrain the sale and subordinate the lien of the trust-deed to the lien of his judgment.

The pleadings of this case are somewhat voluminous, and I deem it unnecessary to make extended extracts therefrom. Drake having obtained the judgment for $2,500, which judgment remained unsatisfied, and having entered upon the possession, as he claims, of the fifty feet of ground under the mining laws of the United States, as public land, and, while claiming title thereto, seeks to subordinate the lien of the trust-deed to the lien of his judgment, and subject the property of the defendant mining company to sale in satisfaction of said judgment. He alleges that the defendants Weitbrec and Cooper are the sole owners of all the stock of the Gilpin County Mining Company, that they have declared dividends resulting from the products of the mine when said company was indebted to him; that the various notes secured

by the said deed of trust were not legal obligations against the company, and that it was in no way indebted to Cooper and Weitbrec by reason of the execution of these said notes. Drake having deceased before the cause was reached for trial, the action was continued in the name of his executors, the present plaintiffs in error. A trial to the court without a jury resulted in findings and judgment for the defendants.

Much appears in the complaint which is without bearing upon the actual controversy between the parties. It does not appear, however, by averment or otherwise, that any of the defendants are insolvent, and it is not shown, either by testimony or by the pleadings, that the plaintiff was induced by fraud or misrepresentation to enter into the contract of sale.

The consideration to be paid for the fifty feet was the sum of $2,500; the judgment against the company was rendered accordingly. It is admitted by the pleadings (the defendants having alleged it and the plaintiff not having denied it) that as a part of such judgment it was ordered and adjudged by the court that the said plaintiff deposit, and keep on deposit, with the clerk of the District Court a deed of conveyance of said fifty feet of said Williams lode, said deed to be delivered to the defendant, the Gilpin County Mining Company. Thereafter, and before the institution of this suit, Drake having, as he alleges, deposited the deed to the property with the clerk of said court, assumed and avers in his replication to the answer, that the company had neglected to comply with the mining laws of the United States; had forfeited their right to said fifty feet, and that he had the right as a citizen of the United States to enter upon and repossess himself of the title and possession of said property. And this, too, in the face of his contract with the defendant company to make a good title to said fifty feet of ground, free and clear from all disputes, adverse

claims and incumbrances, with covenants of warranty, except as against the government of the United States. Whether such a deed was tendered or deposited in the hands of the clerk is put in issue by the pleadings; the burden of such issue was clearly upon the plaintiff, but no proof was offered thereon by either party. Plaintiff thus fails to show that he had complied on his part with the judgment which he is now seeking to enforce. Instead of doing so, he claims the property while seeking to recover the purchase price. There is no better rule known to equity jurisprudence than that "He who seeks equity should do equity." Drake was obliged to make a deed to the property before he could in equity and good conscience demand the payment of the $2,500. As a "jumper" he entered upon the possession of that property, and asserts an absolute claim to it by reason of a relocation, and thereafter comes into a court of equity and says: "I want the $2,500 which these defendants obligated themselves to pay me for fifty feet of this ground which I originally contracted to sell to them, and which I am now the owner of." In other words, it is an effort by plaintiff to obtain from a court of equity a decree for the enforcement of that part of the judgment which was against defendants, while he leaves unperformed that part which was against himself. He seeks to recover the consideration for premises sold, while he withholds the title deed and the possession, claiming under an adverse title. Under his contract, as recited in his own pleadings, he was obligated to furnish a satisfactory title with covenants of warranty to that fifty feet. Under the decree of the court allowing him a judgment for $2,500 and execution thereon, he was bound to execute and make a deed to it. Being so bound, he says: "I want the court to say that the defendants Weitbrec and Cooper had no right to go into the market and purchase promissory notes of the defendant company secured by a deed of trust; they had no right to declare dividends arising from their

proceeds of their mining operations upon this claim; they had no right to appropriate to themselves individually any sums of money resulting from the products of the said company's operations while I remained a creditor of the company, and by reason of their conduct in this particular, by reason of the fact that they have done things they ought not to have done, I ask that the property of the company be relieved of those incumbrances and that I shall receive full satisfaction of my claim against the company in the sale of the identical five hundred and fifty feet which they purchased, notwithstanding the fact that I am now the possessor and owner of fifty feet to which I contracted to give a perfect and satisfactory title, though I have not given the same."

If plaintiff had deposited and kept on deposit the deed required by the judgment, and some third party, not knowing all the circumstances, had entered upon this fifty feet of ground, then the prayer of this complaint would appear in a different light; but how the individual, who was familiar with the defective title he possessed when he contracted to make the sale, who was familiar with the fact that the $2,500 was due to him only upon making a satisfactory title, assumes that he can ask the aid of a court of equity in the enforcement of that judgment and the payment of that claim under the circumstances here presented, is beyond my fathoming. It is claimed that the sale was, in fact, made by Drake to Weitbrec and Cooper, and not to the company. And yet at the time when Drake was in possession of all the facts, he instituted suit against the corporation and obtained judgment against it as the sole vendee. It will be conceded that the conduct of Weitbrec and Cooper concerning the affairs of the corporation is open to be questioned by a creditor, a *bona fide* creditor, an equitable creditor, one who could step into a court of equity with clean hands, and who, coupled with his equity, could show the insolvency of the

defendant company; but when such a claim to equity emanates from one who seeks to get something for nothing, who occupies the position of being now the owner and possessor of the identical property which moved the defendant company to execute the agreement as evidence of their obligation to him, seeks to obtain a decree for the sale of that portion of the property for which he has been paid in full, his claim does not address itself favorably to a court of equity.

Drake evidently sought by his complaint and his testimony, and the counsel on behalf of appellant herein seeks to convey, the impression that he never understood the language of the papers that he was signing. This cannot be true, especially it cannot be true in the face of his own testimony.

"Q. Under what circumstances did you sign that paper?

"A. When I sold the property up there. It must have been on the table in Mr. Orahood's office, and Mr. Orahood must have told me to sign it and I signed it without any hesitation. He told me to sign that paper and to sign other papers and I signed it. I did it without any question."

Drake was present at the time with his counsel, and the court below was warranted in concluding from the testimony that Drake understood fully at the time the nature of the transaction upon which he entered. It is claimed the capital stock was issued to Drake in order that it might appear to be fully paid up. If this be true, and it seems quite probable from the evidence, plaintiff's position is not benefited thereby. After having taken and retained the benefits of the transaction for these many years, he cannot now be heard to complain.

I am clearly of the opinion that the proof is not sufficient to warrant a decree for the plaintiff in this action, and that the judgment of the District Court should be affirmed.

BISSELL and REED, CC., dissent.

Per Curiam. For the reasons stated in the foregoing opinion the judgment of the court below is affirmed.

Affirmed.

C. W. HONAKER v. JOHN F. MARTIN ET AL.

(11 Montana 91; 27 Pac. 397. Supreme Court. July 29, 1891.)

[1]**Review of the cases** on the point of resumption of work.

[2]**Where the miner claims the statutory privilege** of resuming work after neglect but before relocation by another he must prosecute the same with reasonable diligence and complete the full requirement.

Facts held no resumption. Plaintiff paid the full sum of $100, to a party who claimed to have worked from Dec. 22, 1889, to January 12, 1890: carried $63 worth of logs and lumber to, but which were never used on, the claim, and testified that he did $50 worth of work in January but could show no material amount of sinking or other indication of labor to satisfy such valuation: *Held*, that there was no bona fide resumption.

Appeal from District Court, Jefferson County; THOMAS J. GALBRAITH, Judge.

Action to recover possession of a mining claim by C. W. Honaker against John F. Martin and another. Verdict and judgment for plaintiff. Defendants appeal. Reversed.

CHARLES O'DONNELL, for appellants.

CORBETT & WELLCOME, for respondent.

BLAKE, C. J. This action was commenced by Honaker, the respondent, to recover the possession of the Lone Star Lode

[1]*Emerson* v. *McWhirter*, 133 Cal. 510; 65 Pac. 1036.

Jupiter Co. v. *Bodie Co.* 4 M. R. 413.

[2]*McCormick* v. *Baldwin*, 104 Cal. 227; 37 Pac. 903. *Hirschler* v. *McKendricks*, 16 Mont. 211; 40 Pac. 290. Lindley § 408, Snyder § 564. Mining Rights 11th Ed. 99.

The original owner may resume work at any time before the relocator completes his location. *McKay* v. *McDougall*, 25 Mont. 258; 64 Pac. 669; following *Gonu* v. *Russell* in same state, 12 M. R. 630.

Resumption before entry of stranger saves claim. *Lacey* v. *Woodward*, 5 N. Mex. 583; 25 Pac. 785. *Klopenstine* v. *Hayes*, 20 Utah 45; 57 Pac. 712. *Little Dorrit Co.* v. *Arapahoe Co.* (Colo.) 71 Pac. 389.

mining claim. The answer alleges that "no work or improvements were done or performed upon said Lone Star mine or claim in the year 1889, and in consequence thereof said claim was forfeited, if it ever existed." The court instructed the jury that the evidence "shows that the plaintiff, Honaker, did not do the required amount of work on said claim in said year 1889, and that, therefore, said claim was open to relocation, by any proper person, on the 1st of January, 1890. * * * But to this the plaintiff replies, and says that he resumed work upon said claim after his failure to do said work, and before the time (April 25, 1890) of the location of said claim by the defendants." The jury were further instructed that there was only one question for their consideration, to-wit: "Did the plaintiff, Honaker, in good faith, honestly and in fact, resume proper work upon said claim prior to said location thereof by the defendants?" The following instructions were also given: "If, from all of the evidence in the case, you shall be satisfied that the question * * * should be answered in the affirmative, then you should find for the plaintiff; otherwise for the defendant. * * * In this case the plaintiff affirms and asserts that he did resume work upon the Lone Star claim before the date of the location thereof by the defendants, and therefore the burden of the proof is upon him." The verdict was in favor of Honaker, and the defendants moved for a new trial, which was refused. The issue of law in this case depends upon the construction of this section of the Revised Statutes of the United States: "On all claims located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year; * * * and, upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators,

their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location." Section 2324. The contention is practically limited to the words "resumed work," and most of the authorities furnish definitions which do not satisfy the case at bar. Mr. Justice SAWYER in North *Noonday M. Co.* v. *Orient M. Co.* 6 Sawy. 314; 1 Fed. 522, said: "The statute nowhere authorizes a person to trespass upon or to relocate a claim, before properly located by another, however derelict in performing the required work the first locator may have been, provided he has returned and resumed work, and is actually engaged in developing his claim at the time the second locator enters and attempts to secure the claim." The learned judge repeated this doctrine in *Jupiter M. Co.* v. *Bodie Con. M Co.* 7 Sawy. 115; 11 Fed. 666, and *Lakin* v. *Mining Co.* 11 Sawy. 241; 25 Fed. 337. In *Gonu* v. *Russell*, 3 Mont. 358, it was held that the locator of a lode mining claim "had the right to defeat the forfeiture of his interest in the property by resuming labor thereon before a location thereof had been made by another;" and that "the resumption of labor in good faith," by one who had failed to comply with the statute, *supra*, and perform the work thereby required, before the completion of a new location which had been commenced, nullified the acts of the second locator. Gonu posted his notice, but did not mark out his boundaries until Russell had resumed work. The case of *Pharis* v. *Muldoon*, 75 Cal. 284; 17 Pac. 70, is to the same effect, but an additional fact appears: "At one o'clock A. M. of that day (January 1, 1886) plaintiff posted his notice, but did not mark out his boundaries until January 5th. In the mean time—that is to say, at the usual hour of commencing work of that kind—on the 1st day of January, 1886, the defendant resumed labor on his claim; did ten dollars' worth of work on it up to the 5th of January, 1886; and afterwards, during that year, performed labor upon it to the amount of two hundred dollars more." See, also, *Lacey* v.

Woodward, (N. M.) 25 Pac. 785; *Belk* v. *Meagher*, 3 Mont. 65; 104 U. S. 279. In the last case Chief Justice WAITE said: "As we think, the exclusive possessory rights of the original locator and his assigns were continued, without any work at all, until January 1, 1875; and afterwards if, before another entered on his possession and relocated the claim, he resumed work to the extent required by the law. His rights, after resumption, were precisely what they would have been if no default had occurred." This opinion seems to give a meaning to the amount of labor demanded by the statute, *supra*, and it must be "to the extent required by the law." Mr. Justice HALLETT instructed the jury in the United States Circuit Court for the district of Colorado, in *Mining Co.* v. *Kimber*, 1 Morr. Min. Rep. 536, that a party who fails to work his claim according to the statute, *supra*, has the right, before the new claimant has perfected his location, "to re-enter," and, upon doing the annual work required by law, he "would become reinvested with" his "first estate." We think that the foregoing authorities establish general and consistent principles.

The case of *Mining Co.* v. *Deferrari*, 62 Cal. 160, cannot be deemed sound in its construction of the statute, *supra*. The question is so important in its consequences that we quote at length from the opinion of Mr. Justice MCKINSTRY: "The court found that in the year 1880 plaintiff expended, in labor on the two claims, one hundred dollars; that in January, 1881, plaintiff resumed work upon the claims, and expended in labor twenty-four dollars. Defendants entered and located in August, 1881. As the plaintiff had resumed work upon the claims 'after failure, and before location,' his rights were not forfeited when defendants entered. Rev. St. U. S. § 2324. It is urged that the resumption of work was not such as is required by the act of Congress; that, if so, one may fail to perform the work required by the act during any year, and yet keep alive his right indefinitely by doing any work during

the January following. In other words, that, by such construction, while the act requires one hundred dollars' worth of work each year, a party may keep his claim good by doing one dollar's worth each year, provided he shall succeed in doing it before a relocation can be accomplished. It is not necessary to decide that an attempt to assert a continuous right may be based upon a pretense of work, so plainly a sham as that it will be disregarded. But here the work done was actual and valuable. The letter of the statute upholds the view, as to resumption of work, taken by the court below, and forfeitures and denouncements are not to be favored by basing them upon language which does not plainly and unmistakably provide for them." Of this case Mr. Morrison says: "Such a decision is only trifling with the law, and the rights of parties based on the law." Mining Rights in Colorado, (6th Ed.) 61. The proposition relating to forfeitures and denouncements cannot be questioned, but another rule appears to be considered more important by the courts. In *Erhardt* v. *Boaro*, 113 U. S. 535; 5 Sup. Ct. 560, Mr. Justice FIELD says: "In all legislation, whether of Congress or of the state or territory, and by all mining regulations and rules, discovery and appropriation are recognized as the sources of title to mining claims, and development by working, as the condition of continued ownership, until a patent is obtained." The learned judge in *O'Reilly* v. *Campbell*, 116 U. S. 418; 6 Sup. Ct. 421, says: "It is a rule among miners on the public lands, so often brought to our attention and so often declared that we may speak of it as part of our judicial knowledge, that discovery and appropriation are the source of title to mining claims, and that development by working is the condition of their continued possession. *Jennison* v. *Kirk*, 98 U. S. 453; 457; *Jackson* v. *Roby*, 109 U. S. 440; 3 Sup. Ct. 301. This was the rule before Congress by its legislation sanctioned it." In *Remmington* v. *Baudit*, 6 Mont. 138; 9 Pac. 819, Chief Justice Wade said: "The purpose of requiring $100 worth of

work or improvements on a mining claim each year is to so develop the mine as that a patent may issue for the claim. It is not the policy of the government to issue patents for the mineral lands until there has been a discovery, and sufficient work done upon the claim to demonstrate its value. * * * A liberal construction should be given to the mining act of 1872, but it should not be so liberal as to authorize a claim to be held without representation, or a patent to be procured before any work has been done on the claim." The result of the holding in *Mining Co.* v. *Deferrari, supra,* is to defeat the real objects of the statute, *supra,* which are the exploration and development of mining claims. Every person who continues in the possession of such property upon the public domain of the United States, without performing annually the labor that has been specified, violates the conditions of the grant from the government. The resumption of work by the original locator, whose rights are subject to forfeiture, without the expenditure, with reasonable diligence, during the year of the sum of $100 for labor or improvements upon the mine, is an evasion of the statute, *supra.* If we comprehend the language of Chief Justice WAITE, *supra,* and Mr. Justice HALLETT, *supra,* the courts will not legalize such overt acts of omission as are stated in *Mining Co.* v. *Defarrari, supra.* The question, which is embodied in the instructions of the court below, was submitted without any explanation of the words "resumed work," and would have a tendency to mislead the jury. They could reasonably infer that any labor showing the intention of Honaker to reassert his claim to the property was a sufficient compliance with the law. When the testimony is compared, there can be no doubt that this was the effect.

It is shown by the evidence upon the part of Honaker that he did not represent the lode in the year 1887, and relocated it January 1, 1888; that he did not go upon the property from this date until the month of May, 1890, when

the defendants were in possession; that about December 20, 1889, he made a contract with Richard Berriman to represent the same for the year 1889; that Berriman labored from December 22, 1889, until January 12, 1890, under the contract, and received from Honaker $100; that logs, slabs, and lumber of the value of $63 were conveyed to the premises, and never used; that these materials were for a shaft-house or any necessary purpose on the mine; that Berriman testified he drifted "perhaps five or six feet," and did not haul any dirt from the mine; that he cut in the woods "about half a dozen" logs, and put them in the mine; that he carried there a rope, bucket, and shovels and picks, and removed them when he quit work; that there was no windlass upon the mine; and that he did not know how much he earned in January, 1890, but there was "over fifty dollars of it." The testimony for the defendants tended to prove that no work was done for Honaker upon the property in the years 1889 and 1890; that the logs, slabs, and lumber were hauled there, and not used; that tools, buckets, and wire rope were taken to the premises by Berriman, and carried away; that there were no timbers in the mine; and that the property was examined carefully to see what labor had been done upon it, and located by the defendants, April 25, 1890. It is clear that the respondent has not acted honestly and in good faith, and that, during the years 1887, 1888, 1889, and 1890, when the lode should have been developed by the expenditure of the sum of $400 for work or improvements, there is a conflict in the testimony upon the point as to whether labor of the value of one cent has been expended thereon. When, therefore, he availed himself of the statutory privilege of resuming work to preserve his estate from forfeiture, we hold that he should have prosecuted the same with reasonable diligence, until the requirement for the annual labor and improvement had been obeyed. The tools, rope, and windlass were taken from the premises about January 12,

1890, and the logs, slabs, and lumber have not been used in any manner, although nearly two-thirds of the money which was paid by Honaker to Berriman have been therein invested. What is the fair presumption from this conduct? Can it be maintained that it is the intention of the statute, *supra*, that, under these circumstances, the respondent shall be adjudged to have "resumed work"? If it be insisted that the instruction by the clauses, "in good faith, honestly and in fact, resume proper work," was designed to lay down the law in accordance with these views, then the verdict is contrary thereto.

It is therefore adjudged that the judgment be reversed, and the case be remanded, with directions to grant the motion for a new trial.

Reversed.

HARWOOD and DE WITT, JJ., concur.

G. J. LILLIBRIDGE ET AL. v. LACKAWANNA COAL CO.

(143 Pennsylvania 293; 22 Atl. 1035. Supreme Court. Oct. 5. 1891.)

The surface of land and the minerals beneath it may be dissevered in title and become separate tenements. In case of such severance, the mineral becomes a separate corporeal hereditament, and its ownership is attended with all the attributes and incidents peculiar to the ownership of land.

Fee simple in the coal. An instrument in the form of a lease granting and letting "all the merchantable coal" together with the sole and exclusive right to mine and remove the same: *Held* "an absolute grant in fee simple of all the coal under the tract."

[1]**Such grantee owns the space** which was occupied by the coal before the coal was mined.

[2]**Underground right of way. Instroke.** Being such owner it has the right to carry foreign coal through such space as it sees fit.

There is no substantial difference between a title by exception out of a grant, and a title by direct grant of the same subject. Under an exception from a conveyance of land of all the coal therein, the dominion of the grantor over the coal is no greater, and his ownership is no more absolute, than if his title were acquired by purchase from one owning both coal and surface.

Appeal from Court of Common Pleas, Lackawanna County; FRED W. GUNSTER, Judge.

Bill in equity by G. J. Lillibridge *et al.* to restrain the Lackawanna Coal Company, Limited, from carrying, through a

[1]*Armstrong* v. *Auen*, 17 M. R. 392 and notes. But see especially on the main point of the text case *Webber* v. *Vogel*, 189 Pa. 156 and its notes as reported in 19 M. R.

Construction of deed conveying "all coal" but limiting the right to remove it to a certain time. *Butler* v. *McGorrisk*, 114 Fed. 300.

A deed conveying the privilege of mining for coal gives no right to the space it occupied after it has been removed. *Sholl* v. *German Co.* 139 Ill. 21; 28 N. E. 748.

A lessee continuing after the demised coal was exhausted, to use the shaft to get other coal by instroke from adjoining ground is liable for the full rent reserved. *Lennox* v. *Vandalia Co.* 158 Mo. 473; 59 S. W. 242.

[2]An underground right of way held not reserved where the lessee was not to be injuriously interfered with and it was practicable to get the coal without it. *Reliance Co.* v. *Kentucky Co.* 17 M. R. 609.

tunnel made in coal conveyed by complainants to respondent, other coal dug out of an adjacent mine, which respondent was bringing to the surface through an opening in its own land. Demurrer to bill sustained, and complainants appeal. Affirmed.

JOHN S. HARDING and GARRICK M. HARDING, for appellants.

HENRY A. KNAPP and EVERETT WARREN, for appellee.

GREEN, J. It is not at all questioned, but is expressly conceded, by the learned counsel for the appellants, that the agreement between these parties is an absolute sale to the defendant of all the merchantable coal underlying the tract of land in question, and that the surface of the land and the minerals beneath it may be dissevered in title and become separate tenements. This doctrine has been so frequently decided by this court, and in such varying circumstances, that a mere reference to some of the leading cases, will be all that is necessary for the present occasion. *Caldwell* v. *Fulton*, 31 Pa. St. 475; *Caldwell* v. *Copeland*, 37 Pa. St. 427; *Scranton* v. *Phillips*, 94 Pa. St. 15; *Sanderson* v. *City of Scranton*, 105 Pa. St. 469; *Railroad Co.* v. *Sanderson*, 109 Pa. St. 583; 1 Atl. 394.

In the opinions delivered in the foregoing and other cases we have emphatically decided that the coal or other mineral beneath the surface is land, and is attended with all the attributes and incidents peculiar to the ownership of land. We have held the mineral to be a corporeal, and not an incorporeal, hereditament; that the surface may be held in fee by one person, and the mineral also in fee by another person; that the mineral may be subject to taxation as land, and the surface to an independent taxation as land, when owned by a different person; that possession of the mineral may be recovered by ejectment, and title to it may be acquired by adverse possession under the statute of limitations, though

not by prescription, because it is not an incorporeal right. In short, we have for nearly half a century judicially regarded the ownership of mineral, where it has been properly severed from the surface, as the ownership of land, to all intents and purposes. Said STRONG, J., in *Caldwell* v. *Fulton*, *supra:* "Coal and minerals in place are land. It is no longer to be doubted they are subject to conveyance as such. Nothing is more common in Pennsylvania than that the surface right should be in one man, and the mineral right in another. It is not denied in such a case that both are land-owners; both holders of a corporeal hereditament." WOODWARD, J., in *Caldwell* v. *Copeland*, *supra*, said: "There is no more reason why mines in another's land, whether opened or unopened, may not be held by a deed duly acknowledged and recorded, than why land, in its most ordinary signification, may not be so held. In other words, mines are lands, and subject to the same laws of possession and conveyance."

In the litigated causes the contentions have been rather upon the interpretation and legal effect of the instruments under which the questions have arisen than upon the doctrine itself. No such contention arises here, as counsel have very candidly conceded, what was indeed inevitable, that the instrument between the present parties came clearly within the adjudged cases, and created an estate in fee-simple in the defendant in the coal underlying the plaintiffs' surface. It includes "all the merchantable coal" under the surface, "with the sole and exclusive right to mine and remove the same," and with this *habendum:* "To have and to hold the coal in and under said land unto the said party of the second part, its successors or assigns, until the exhaustion thereof under the terms of this indenture." It is not possible that there can be any question that this is an absolute grant in fee-simple of all the coal under the surface of the tract.

But it is contended, with great earnestness and ability by the learned counsel for the appellants, that nothing more

than the coal passed to the defendant under the agreement; and, as to the chamber or space left by the removal of the coal under the mining operations of the defendant, the plaintiffs were still owners in fee, or reversioners, with a right which could not be invaded by the defendant, except for the purpose of removing the coal that underlaid the surface. This brings us to consider the precise character of the present proceeding, and the particular question that arises under it. The proceeding is a bill in equity to restrain the defendant from removing coal belonging to it on another tract adjoining this tract on the north, by moving the same through a tunnel or way made by the defendant through one of the underlying veins of coal across the tract to the other land of the defendant, 200 feet below the surface, of considerable breadth, and 12 feet in height. It is alleged in the bill that this way was produced by the mining operations of the defendant in accordance with the contract, and that the defendant, having acquired the adjoining property after the agreement with the plaintiffs was made, has been and is taking out coal from the adjoining tract through and over this tunnel or way, and this is claimed to be an illegal use of the plaintiffs' property, which they ask to have restrained. The argument is that it was not within the intention of the parties that such a right should be granted or exercised, and that, whether it was or not, the plaintiffs have such a property in the chamber or space left by the mining operations that it cannot be used without their permission.

There is nothing in the instrument, or in the circumstances surrounding it, which can give any force to the argument from intention. We cannot know what was the intention of the parties, except from the terms of their contract. The defendant demurred to the bill for want of equity. No testimony of any kind has been taken. The bill makes no averment of any intention of either of the parties, but simply sets out the contract, and the acts of the defendant in exe-

cuting its terms. Of course, there are no surrounding facts that we can consider. There are none in the bill, except such as are subsequent to the contract, and these amount only to an allegation of the subsequently acquired interest of the defendant in the adjoining property, and the removal of coal therefrom through the way made by the removal of the coal under the tract.

The proposition that the plaintiffs have a fee in the chamber or space left by the removal of the coal, antagonistic to the right of the defendant to use it, is a novel one. No authority is cited to support it, and it seems quite incongruous with the admitted ownership and estate of the defendant in the coal displaced. Under all the decisions, the coal in place was absolutely owned in fee-simple by the defendant. In a state of nature the coal necessarily occupied space. How could the defendant own the coal absolutely and in fee-simple and not own the space it occupied? Or how is it possible to conceive of such a thing as the ownership of the space independently of the coal? If the coal in place is a part of the very substance of the soil, more corporeal than the surface, as was said in *Caldwell* v. *Fulton*, how can the law regard the space which the substance occupies as other than the substance itself? Of course, such an idea is incapable of practical application, except upon the theory that the coal is not a corporeal substance, to be sold and delivered, but that only an incorporeal right to remove it passes to the grantee under a conveyance; and such is the real nature of the appellant's argument. It could not be otherwise. Certainly, if such were the nature of the defendant's right, the argument and the authorities cited in support of it would be applicable and of controlling force; but it is a sufficient reply to all of them to say that all the decisions are directly the other way, and that they all establish that a conveyance of the coal in fee carries everything with it, just as fully and completely as a conveyance of the soil above. We said in

Caldwell v. *Fulton:* "It is a common thing in the mineral districts of Pennsylvania for the surface to belong to one owner, and the coal which it covers to another. Both the surface and the coal are held by deeds, executed and delivered, and recorded in the same manner; and there is no more reason for considering the coal an incorporeal hereditament, because it has not been opened, than there is for considering the soil such because it has not been plowed. Still less reason is there for calling it an incorporeal hereditament if the deed happen to describe the grant as a right to enter, dig, and carry away all the coal, instead of describing the coal without the customary circumlocution. In all these cases, where the right rather than the thing is described, nobody is at a loss to know what is intended to pass. It is the thing that is bought and sold, and, where that is a coal-bed, it is an abuse of language, and an unnecessary application of legal distinctions to call it an incorporeal hereditament." If, then, the coal in place is a pure corporeal hereditament, the title in fee-simple to which passes to a purchaser by apt conveyance, there would be no more propriety in claiming a title in the grantor to the space it occupies than there would be in claiming a similar right in a vendor of the surface to the space developed by the vendee in digging the cellar and foundations of a house. We are altogether unwilling to adopt any such view of the rights of the parties in either of such cases.

By the necessity of the case, the appellants argue that the defendant's right in the chamber or way is only an easement, and then cite authorities that an easement can only be exercised to the extent of the grant. But, as we have already seen, this is in direct hostility to all the authorities on that subject. If the subject be further considered upon principle, it will be found difficult to understand that any property right of the appellants is invaded by the action of the defendant. According to the averments of the bill, the

tunnel or way is cut through a vein of coal, 200 feet below the surface, and is 12 feet high, and extends in the vein all the way from the one side to the other of the tract. In this way or chamber the plaintiffs, as owners of the surface, have no right or title. They have no access to it; they cannot use it; they are in no manner obstructed or injured by it. Nor can we understand how they are or can be injured in any other way. It is of no avail to say generally in the bill that they are injured. The injury must be stated specifically, so that a court may know what it is. This is not done, and we know not what the injury complained of is. How, then, can we enjoin the defendant? We are asked to enjoin against the removal of coal from the adjoining tract, but this is a matter with which the plaintiffs have no concern. They do not pretend to have any title or interest in that coal. They ask to enjoin removing that coal through the chamber or way made by the defendant through its own property, to-wit, the coal sold to them by the plaintiffs. Why or for what reason should we do this? The plaintiffs would gain nothing which they do not now have, if we did. No complaint is made in the plaintiffs' bill of either the deprivation or injury of any right growing out of the contract. The plaintiffs cannot possibly use any part of the space left by the removal of the coal, and hence they are not obstructed in the slightest degree. The right to use that space is exclusively in the defendant, and that use is not, and cannot be, questioned by the plaintiffs. It is not alleged that the defendant has failed to perform any duty imposed upon it by the contract. We are bound to assume, therefore, that all the coal which the defendant agreed to take out or pay for each year has been taken out or paid for. In no circumstances would the case be a proper one for an injunction.

But upon the authorities the case is entirely with the defendant. The question has arisen in several cases in the

British courts, and the right of the owner of the coal to use the tunnel or way to carry other coal through it than that underlying the land of the surface owner, has always been affirmed. The subject is thus presented in McSwinney on Mines, (page 67): "The owner in fee-simple or tail, of lands containing mines or quarries, has an absolute right to use them, and the chamber which encloses them, and the space or shell which the working of the minerals creates, and the subsoil generally, in any manner which he thinks proper; and where the owner in fee-simple of lands grants them, excepting the underlying mines, he has, with respect to those mines, a similar right. And as, by excepting the mines, he *ipso facto* excepts the chamber which encloses them, he has a similar right with respect to that chamber, and with respect to the space or shell which the working of the minerals creates. The containing chamber is not purely and solely a species of property which can only be made profitable by the removal of the enclosed minerals, with the incidental right of using all proper means for obtaining them. It is a species of property which is as free as other property from restrictions as to its mode of use. The grantor may therefore use the space or shell created by his previous working of the enclosed minerals as a thoroughfare for the carriage of minerals gotten out of his adjoining land; and if, instead of working the enclosed minerals, and then utilizing the space or shell thereby created, he prefers to cut a passage through those minerals for the express purpose of using it, and to accordingly use it, as a thoroughfare for the carriage of other minerals, he is entitled to do so."

In *Hamilton* v. *Graham*, L. R. 2 H. L. Sc. 166, there was an exception in a free charter in favor of the duke of Hamilton and his heirs of all the coal and limestone within the lands granted. He was the owner of three estates, Clydesmill, Cambuslang and Morristown, and one Graham had become the owner of the surface of Cambuslang. The duke leased

the coal in Clydesmill, and a portion of the coal under Mr. Graham's surface in Cambuslang, and his lessees at once made use of a passage-way through the coal underlying Graham's surface, for the conveyance of other coal and limestone mined from the estates of Clydesmill and Morristown, and this coal and limestone the duke owned by virtue of the reservation or exception out of the grant of the surface. Mr. Graham brought an action to stop the further use of the passage, but it was held, on appeal to the house of lords, that this was a rightful use of the passage. Lord WESTBURY, delivering his opinion, said: "You may approach it laterally from another estate, for the purpose of mining the minerals. You may use the strata which you have reserved to yourself, or rather declared to remain in yourself, in any manner consistent with ownership. You may traverse it from any adjoining land you have. You may create a road or tunnel through it, and you may, through that road or tunnel, carry either the minerals or any other proceeds of an adjoining estate. You therefore have, for there is nothing to restrain you, the same universal right and unlimited power of enjoyment of the estate that remains in you, as you had antecedently to the grant of the *dominium utile*, the enjoyment of which that grant of the *dominium utile* in no respect impairs or affects." Lord COLONSAY in the same case said: "It is a great mistake to say that the duke has no right to use these minerals except for the purpose of bringing them to the surface. He may use them in the way which is most beneficial to himself. * * * There is no doubt that the duke of Hamilton was not entitled to increase the burdens of the servitude on the surface by bringing the minerals from the other property over the surface. The surface was the servient tenement, and the minerals under that tenement were the dominant tenement in regard to that particular right of servitude. But the principle does not apply in regard to the right of property, and to say that he is carrying the

minerals through the property of the pursuer is another mistake. He is carrying them through his own property, and not through the property of the pursuer at all. There is a want of keeping in view the distinction between the right of property and the right of servitude here, which seems to me to have led to an erroneous judgment in the case. I conceive that, so long as there is any of the mineral property which the Duke of Hamilton has, he is entitled to use any of that property in the mode which is most beneficial to himself." The lord chancellor also said, referring to his opinion in the case of *Proud* v. *Bates*, 34 Law J. Ch. 406: "As to the excepted mines, I held that the owner had an absolute right to do as he pleased with them, and that he therefore had a right to carry his coals through them."

In this last-mentioned case of *Proud* v. *Bates*, a lease was made of the waste land of the manor, with an exception of the mines and quarries, with full power to mine and work the same. A way available for the carriage of minerals lay exclusively within the excepted mines, and the lord claimed the right to carry through this way minerals worked on other property than that embraced in the lease. The court held that he had an absolute right to do what he pleased with the excepted mines, and therefore he had a right to carry through them minerals from wherever gotten. Vice-Chancellor WOOD, in delivering his opinion, said: "Now, whether the word 'mines' be used, as it often is, in the sense of minerals,—the thing dug out of the mine, or that which contains the minerals,—that which contains cannot be less than the thing contained; and therefore there is no doubt that the whole containing chamber which has the minerals is 'the mine,' and, so far as the mines are concerned there can be no question that they are altogether out of the demise, and as to them the representatives of the lessee are, of course, entitled to use them for any purpose whatever

and at any period. Lord CAMPBELL'S decision in the cause of *Bowser* v. *McLean*, (2 De Gex, F. & J. 415.) in this court, completely explains what the right view is. He says: 'With regard to copyholds, the copyholder has the whole right in him, but subject to the right of the lord to work the mines; and the lord cannot use an under-ground way for the purpose of passing through any portion of the copyhold premises. But as to that which is excepted out of a demise by contract, of course the owner can use whatever he excepts, just in any way he may think fit.' " In *Eardley* v. *Granville*, L. R. 3 Ch. Div. 826, JESSEL, M. R., says: "If a freeholder grants lands excepting mines, he severs his estate vertically, *i.e.*, he grants out his estate in parallel horizontal layers, and the grantee only gets the parallel layer granted to him, and does not get any underlying mineral layer or stratum. That underlying stratum remains in the grantor." Referring to the case of *Hamilton* v. *Graham*, he said: "I decided that the same law applies to Scotland which applies to England. In a case like that, the word 'mines' meant subsoil containing the minerals, and not merely the minerals themselves."

The appellants reply to these cases by saying they were cases of exceptions out of grants, and the mines reserved or excepted were the property of the grantors, and never were conveyed; hence they held everything not granted by their original title. But the distinction is without force. There is no substantial difference between a title by exception out of a grant and a title by direct grant of the same subject. In the case of an exception, the grantor retains the whole title which he already holds; and in the case of a direct grant, the grantee holds the whole title granted, and the ownership is as absolute in the one case as in the other. We have held that a grant of all the coal underneath a tract of land is an absolute conveyance in fee-simple of all the coal, and no greater title than that could be acquired by an excep-

tion to the same effect in a grant of the surface. The books make no distinction.

Thus in Washburn on Real Property (volume 3, p. 432) it is said: "As an exception is the taking of something out of the thing granted, which would otherwise pass by the deed, it may be said, in general terms, that it ought to be stated and described as fully and accurately as if the grantee were the grantor of the thing excepted, and the grantor were made the grantee by the exception." In *Bowser* v. *McLean*, 2 De Gex, F. & J. 415, the lord chancellor said: "I am inclined to think that a mistake has been committed in not distinguishing between a copyhold tenement with minerals under it, and freehold leased land with a reservation of the minerals, or freehold land where the surface belongs to one owner and the subsoil containing the minerals belongs to another, as separate tenements divided from each other vertically instead of laterally. If this had been such freehold land, the owner of the surface could not have complained of the making or of the excess in using a tramway through the subsoil." In *Whitaker* v. *Brown*, 46 Pa. St. 197, we held that, where a deed in fee of land was made, the grantor "saving and reserving, nevertheless, for his own use the coal contained in said piece or parcel of land, together with free ingress and egress by wagon road to haul the coal therefrom as wanted," the saving clause operated as an exception of the coal, and therefore that the entire and perpetual property therein remained in the grantor. The whole reasoning of the opinion puts the case upon exactly the same footing as if the words of the exception had been contained in a specific grant of the coal; and *Caldwell* v. *Fulton* and kindred cases were cited as authorities for the ruling. In McSwinney on Mines, p. 68, the author says: "Similar principles apply where the owner grants it (the surface) by way of lease excepting the mines, or where he grants the mines in fee-simple and excepts the surface." In Bainb. Mines, *34, the author says: "The

severance of mines is usually effected by exceptions in deeds of assurance, which transfer the freehold in the surface and reserve the mines. An exception is distinguished from a reservation by its being part of the thing granted, and in existence at the time of the grant, while the latter is a right of new creation arising out of the subject of the grant. They are different in legal effect, but in their creation 'there is no magic in words'; and, if the meaning is clear, either of the above expressions will operate for the purpose designed. They are also construed exactly in the same way as actual grants. In either case, the law favors their construction by giving them all proper and necessary incidents."

There is no averment in the bill that all the coal in the vein has been taken out, or that the tunnel is opened on the bed-rock underneath the vein. On the contrary, it is alleged that the tunnel has been cut through the coal, by which we understand it is in the very body or substance of the coal which was bought by the defendant. It follows hence that the tunnel or way is exclusively within the defendant's own property, and is subject to such use as any owner may desire of property belonging to himself. Upon the whole case, we think the disposition of it made by the learned court below was correct.

Judgment affirmed.

STERRETT, MCCOLLUM, and MITCHELL, JJ., dissent.

JAMES McGOWAN ET AL. v. A. L. BAILEY ET AL.

(146 Pennsylvania 572; 23 Atl. 387. Supreme Court. January 4, 1892.)

[1]**Preliminary contract not merged in deed.** A stipulation contained in a contract for the sale of land, but omitted from the deed executed in pursuance of the contract, will not be extinguished by the merger, when its place is not taken or supplied by the express or implied operation of the provisions and covenants which the deed does contain.

Instance. Right of way. A stipulation, in a contract for the sale of coal, to convey along with it certain mining rights to be exercised on the surface of the land, was not merged in a deed afterwards made for the coal which omitted to convey such rights; and it was admissible in defence to an action against the vendee for trespassing upon the surface.

Future damages in surface support case. Damages already suffered and those likely to result from support already removed may be recovered, but not damages for support not yet removed.

Appeal from the Court of Common Pleas, Allegheny County.

Action of trespass by James McGowan and William McGowan against Austin L. Bailey and others. Defendants appeal from a judgment entered upon the verdict of a jury for plaintiffs. Reversed.

Plaintiffs, owners of a farm, claimed damages for alleged unskillful mining by defendants of the underlying coal in not leaving or putting up proper and necessary supports for the surface, as a consequence of which the surface was broken and a spring destroyed; opening a pit mouth, and constructing a trestle upon the surface; and defiling the running waters on plaintiffs' land by draining from defendants' mines. The court excluded the claim for loss of the spring, and no testimony was offered or claim made as to damages resulting from drainage of the mines. It appeared

[1]The original contract cannot be resorted to "unless it is shown by otherwise competent testimony that something remained to be done after the transfer of title." *Keator* v. *Colorado Coal Co.* 3 Colo. App. 191; 32 Pac. 857.

at the trial that on May 7, 1866, plaintiffs, who were then the owners of both the coal and surface, agreed to sell the coal to defendants' predecessor in title, John O'Neil, with certain surface rights, and that, in pursuance of that agreement a deed was executed August 3, 1868.

The jury rendered a verdict for plaintiffs, and, the court refusing to grant a new trial, defendants appeal, assigning as error (1) the refusal to admit in evidence the articles of agreement of May 7, 1866; (2) "allowing plaintiffs to give evidence of damages alleged to have been sustained by reason of the opening of a pit-mouth and erection of a trestle for a coal railway"; (3) the charge to the jury as to the liability of defendants for building the trestle; (4) the charge to the jury that "the damage that has been actually suffered, and the damage likely to be suffered, from the removing of the supports you will take into consideration, and come to your conclusion in this case without regard to the parties."

J. McF. CARPENTER, for appellants.

JOS. FORSYTHE and W. B. RODGERS, for appellees.

GREEN, J. In the case of *Close* v. *Zell*, 141 Pa. St. 390; 21 Atl. 770, we considered with care the subject of the merger of stipulations, whether in writing or verbal, in contracts for the sale of lands, followed by deeds in pursuance thereof, from which the stipulations thereof were omitted. In that particular case we held that a parol stipulation by the vendor of land to refund the purchase money in the event of a failure of title, and to reimburse the vendee for any costs and expenses incurred, was not merged in a deed containing a covenant of special warranty, but no covenant of title, afterwards accepted by the vendee in consideration thereof. It was the absence of the omitted stipulation from the deed, or from the implied operations of the covenants which the

deed did contain, that entitled the omitted stipulation to consideration independent of the deed, as a source of legal obligation.

The various phases of the subject, as illustrated by the cases cited in the opinion, were considered at some length. It is not necessary to repeat here the reasoning contained in the opinion. We think the present case comes clearly within the decision.

While the deed from the plaintiffs to O'Neil is not printed in either of the paper books, and we therefore cannot contrast it with the original articles of agreement for the sale, it is stated by the court and counsel that the deed to O'Neil did not contain that provision of the articles, or any substitute for it, which is expressed in the articles in the following words, viz: "With rights of way for any railroads, entries, etc., which the said John O'Neil, his heirs and assigns, may see proper to make at any time for the purpose of working his pits, together with all suitable air drifts, pit mouths, watercourses, places for depositing slate and slack, and all other things necessary and proper for the suitable running of said coal or any other coal that said O'Neil may want to run."

We assume that there are no covenants in the deed which take the place of or supply the omitted clause of the articles. We will not now undertake to determine the importance of this omitted clause of the original agreement to the defendants. As it contains, among other things, the grant of a right to run other coal than such as might be mined on the land, it is manifest that it does or may embrace consequences and rights which do not follow from a subsequent deed which merely conveys the coal on the land. We are clearly of opinion that the original agreement of May 7, 1866, between the McGowans and O'Neil was competent testimony, and should have been admitted in evidence. This sustains the first assignment of error.

The second assignment contains no specific offer of proof admitted contrary to defendants' objection, and we can find no exception which sustains it. It is therefore dismissed.

The matter covered by the third assignment seems to be a consequence of the rejection of the original articles of agreement, and, in so far as that view of it is applicable, we sustain the assignment. It is difficult to see, however, in the specific language of the court, anything of which the defendant can complain. The court told the jury that, if the way were necessary to get out the coal, the right to it passed by the grant, and also that, if the plaintiffs stood by and saw the defendants building and using the trestle without objection, they might and ought to infer that it was a necessary right of way. All this was favorable to the defendants. But the court added, if it was not a necessary right of way, and the jury could find there was any damage, they should find in favor of the plaintiffs. This, of course, ignored the effect of the articles, and, if they were properly out of the case, the charge would be correct. We have held, however, that it was error to disregard the articles which expressly conferred the right in question.

As to the fourth assignment, we hardly think the learned court intended to say that damages resulting from the possible removal of supports in the future could be recovered. As we understand the language excepted to, it was meant to convey the idea that damages already suffered, and damages likely to result, from the removal of supports already taken down, might be recovered, and in that view we see no error in this part of the charge, and the assignment is not sustained.

Judgment reversed and a new venire awarded.

H. O. McKNIGHT v. MANUFACTURERS' NATURAL GAS CO.

(146 Pennsylvania 185; 23 Atl. 164. Supreme Court. Jan. 4, 1892.)

Physical distinctions between oil and gas affect construction of leases. A leasehold, operated for oil production, imposes on the lessee, after ascertaining the existence of oil, the duty of sinking so many wells as may be reasonably necessary, in view of operations on adjoining lands, to secure so much of the oil from the land demised as may be obtained with profit. The duty imposed upon the lessee in a leasehold operated for gas cannot be measured by the same rule applied in the same manner as in the case of a leasehold operated for oil; the peculiar characteristics of the business of producing and transporting natural gas being such as to distinguish it for some purposes from operations for oil.

[1]**No implied covenant to sink second gas well.** In an action against a lessee who had drilled one paying gas well upon the premises, for not putting down other wells to protect the territory against the effect of operations on adjoining lands, it was error to charge that a failure to drill such wells was a breach of an implied covenant, imposing a liability in damages in the absence of a reasonable excuse therefor.

Lessor failing to designate place to drill. Moreover, when a lease provides that all wells shall be located by the lessor, he may not maintain an action against the lessee for not drilling additional wells, if he never fixed upon a location for any additional well, or called upon the lessee to locate one for him; the lessee having no right to drill except at points indicated by the lessor.

[2]**Destruction of first well.** Whether, if first well destroyed, lessee must make a second not decided—but lessee cannot hold the premises and refuse to operate them.

Appeal from Court of Common Pleas, Washington County; McILVAINE, Judge.

Action by H. O. McKnight against the Manufacturers' Natural Gas Company to recover damages arising from the alleged negligence of defendant in managing a gas well on plaintiffs' land, and also from its failure to drill additional

[1]*Colgan* v. *Forest Oil Co.* 194 Pa. 234; 45 Atl. 119.
[2]*Steelsmith* v. *Gartlan*, 45 W. Va. 27; 29 S. E. 978.

wells on the land under what was claimed to be an implied covenant in the lease fully to develop the farm for gas. Judgment for plaintiff. Defendant appeals. Reversed.

ACHESON & IRWIN, GEORGE W. GUTHRIE, and W. MACRUM, for appellant.

J. W. MCDOWELL, JAMES P. SAYER, and J. L. JUDSON, for appellee.

WILLIAMS, J. A lease of the surface for agricultural purposes implies, if it does not express, an agreement on the part of the lessee to cultivate the demised premises in accordance with the ordinary methods of husbandry. Without such cultivation the premises will not be productive, and the landlord will suffer a substantial loss. A lease of a mine or a quarry, at a rental to be fixed by reference to the quantity of material removed therefrom, implies an agreement on the part of the lessee to work the mine or quarry. The reason is that, while the lessor does not lose his material out of the mine or quarry, he loses his income therefrom. *Watson* v. *O'Hern*, 6 Watts 362; *Koch's Appeal*, 93 Pa. St. 434. A lease of land for oil purposes imposes a somewhat different obligation upon the lessee. The oil is of such a nature that, if not removed through wells upon the surface of the leasehold, it may be wholly lost to the owner of the land by reason of operations on lands adjoining. The duty to develop the land—that is, to test thoroughly the existence of oil in the rocks that should bear it, and, if oil be found, to sink so many wells as may be reasonably necessary in view of surrounding operations to secure so much of the oil underlying the land as may be obtained with profit—grows out of the nature of oil, and the methods by which the oil is reached and brought to the surface. An oil lease must be construed,

therefore, with a due regard to the known characteristics of the business. *Brown* v. *Vandergrift*, 80 Pa. St. 142.

Oil and gas leases are ordinarily combined in the same instrument, and are classed together. For many purposes such classification is natural and appropriate, but this case brings us to consider an important difference between oil and gas, which makes it necessary to distinguish for some purposes between an oil and a gas lease.

Oil, when brought to the surface, is gathered into a receiving tank or tanks at or near the well. When necessary or desirable, it is removed by gravity, or by pumping, into the pipe-lines that serve the district in which the well is located, and conveyed to storage tanks, where it remains until delivered to a purchaser. It is a matter of no consequence what the pressure may be at the well, for there can be none in the tanks, except that of gravity. The well that throws off violently its 5,000 barrels per day, and that which reluctantly gives up 4 or 5 barrels under the persuasive power of the pump, will have their product gathered into the same lines of transportation, or resting in the same storage tanks. Gas cannot be gathered, stored or transported in this manner. If found in sufficient quantity, it is turned from the well into the line, and the pressure at the mouth of the well is the motive power by which it is driven through the line to the consumer miles away. If the pressure at a given well is much below that in the line with which it is connected, the gas from that well cannot enter the line, but will be driven back by the superior force it encounters at the point of connection. For this reason a well producing gas in sufficient quantity to be profitably utilized if there was a market for it near at hand, may be entirely valueless if its product must find a market at a distance too great to justify its transportation by a line of its own. In an oil district, each well, no matter how large or how small its product may be, is separately operated, and a well may be profitably operated so long as

its yield pays more than the cost of producing the oil. In a gas district this is impracticable. The product of many wells is gathered into one line so long as the pressure is sufficient. When the pressure in any one falls below the standard necessary for purposes of transportation, that well must be turned off. Its product cannot be transported separately, and, unless it can be used near by, it is valueless. These well-known facts peculiar to the production of gas must be taken into account in the construction of leases for gas purposes.

The lease now before us shows that the parties to it were familiar with these facts, and that they dealt with the subject intelligently. The lease covered the lessor's farm of 250 acres, was to continue 20 years, and was for the "sole and only purpose of mining and excavating for petroleum, carbon oil, and gas." Operations were to commence on the land within 18 months after the execution of the lease, and the lessor reserved to himself the exclusive right to locate all wells that should be put down upon it. If oil was not found in paying quantities, but a sufficient flow of gas was obtained by the lessee to justify an effort to utilize it beyond the premises on which it was found, the lessee was to pay a money royalty equal to "one-eighth of the net proceeds" of the gas so obtained and utilized off the premises. The royalty was changed by supplemental agreements, but the question now raised rests on the provisions of the original lease. If oil had been found in paying quantities in the first well, it is probable that the lessee, although not bound by an express covenant to do so, would have been under obligations to put down an additional well or wells so as to properly test and develop the producton of the farm of the lessor, upon a consideration of the character of the territory and the work being done on adjoining lands. But oil was not obtained, and so much of the contract as relates to it is now without significance. The parties had anticipated this contingency, and provided for it. Their con-

tract made it the duty of the lessee to pay a royalty for gas if the flow was sufficiently strong to enable him to utilize it off the premises—that is, if it was sufficiently strong to justify its transportation by means of a pipe-line to some market, off the premises, for sale. In that case the royalty was to be one-eighth of the net proceeds of the gas so utilized. The flow of gas was sufficiently strong. The lessees arranged to utilize it by means of a branch line, built to reach this well. Meantime it was sold to another company that continued to use it until at or about the time the line was finished, and the well turned into it. This was in December, 1886. It remained in the line until the spring of 1889. The packer got out of order, and an effort was made to draw the casing and clean out the well. An accident prevented this being done, and the well was abandoned.

This action was brought in 1890 upon the theory that the lessee was under an implied covenant to put down other wells upon the premises to protect its lines against operations upon adjoining farms by other parties. This theory appears in the plaintiff's second point, which is as follows: "That, having commenced operations on this lease, the lessee and the defendant under it were bound to prosecute the business of developing, drilling for gas or oil, and securing the same, without interruption, for the common benefit of the parties." The court made answer as follows: "Affirmed, unless the evidence shows that there was a reasonable excuse for such interruption." Again, in the plaintiff's fifth point, the court was asked to say that, if the jury find gas to be a mineral of such nature that if not utilized at a proper time it may be lost forever, then it was the duty of the defendant to operate the plaintiff's land so as to secure the gas before it was lost, and its failure to do so was a breach of an implied covenant, which renders it liable to damages. This point was affirmed, with the following qualification: "Provided, the prompt development and operation of the plaintiff's land was not reason-

ably excused by facts and circumstances that may appear from the evidence." The jury was thus left to apply the same rule, in the same manner, to a gas lease, that might be applied to a lease for the production of oil.

As we have already seen, every barrel of oil brought to the surface may be utilized in the same way. Whether the well that produces it is a strong one, yielding many barrels per day, or a weak one, yielding but few, is a matter that in no way affects the ability of the producer to market his oil, or the price to be obtained for it. In gas territory, the lessee may sink many wells, and find gas in them all, but he can utilize only such of them as have a volume and pressure sufficient to enable him to transport the gas through his line, and deliver it to the purchaser. If no one of them has the requisite pressure, then no one of them can be utilized; the gas must be wasted; the cost of the wells will be lost; and the lessor entitled to no royalty. What is the proper way to develop and operate a gas lease is, therefore, a question beset with some difficulty. Its settlement requires some general knowledge of the business, and some knowledge of the local field. The lessee may have a good well, from which he can utilize the gas with profit. He may put down another on the same farm, and thereby so reduce the pressure in the first as wholly to destroy its value without getting a sufficient pressure at the second to enable him to utilize that. The gas, if coming from one well, would be of great value. Divided in such manner that the volume and pressure at each is below the necessary standard, the whole is lost. Thus the application of the rule laid down by the court below, as the jury must have understood it, might result in this: that the effort of the lessee to discharge the implied obligation of his contract for the common benefit, should end in the total destruction of the leasehold, and a common misfortune. The mistake of the court below was in failing to take account of, and to read into the contract between the parties, the peculiar nature and charac-

teristics of the business of producing and transporting gas, which the parties themselves well understood, and which their contract shows were before their minds when it was entered into.

But the designation of the point at which all wells should be located was the right of the lessor. We do not see, in the testimony as printed, that he ever fixed upon a location for another well, or called upon the defendant to locate one for him. He says more wells should have been put down, but the lessee had no right to put them down except at the points which he should indicate as the location he had fixed upon. Whether the defendant is justified in abandoning the premises altogether because of the accident to the well in 1889 is a different question, and one not fairly raised upon this record. The defendant cannot hold the premises and refuse to operate them. This question may assume more importance upon another trial.

The judgment is reversed, and a venire facias de novo awarded.

IRON SILVER MINING CO. v. MIKE & STARR GOLD & SILVER MINING CO.

(143 U. S. 394; 12 Sup. Ct. Rep. 543. Supreme Court. Feb. 29, 1892.)

[1]**The term "known vein" as used in the mining Acts excluding known veins from the grant of a placer patent, includes a lode whose existence has been disclosed although it may never have been appropriated by location.**

[2]**Date when known.** Such vein to be excepted must have been known to exist at the date of the application for the placer patent and not merely at the date of patent itself.

Blanket vein. The title to portions of a horizontal vein or deposit, generally called a "blanket vein," may be acquired under the sections of the Revised Statutes concerning veins, lodes, etc.

Greater includes the less. On an issue as to whether a certain vein was excepted from the patent, it was harmless error to charge that it was excepted if known to exist at the date of the patent, when all the evidence offered with respect to the existence of such knowledge related to a time anterior to the application.

What is proof of knowledge. The knowledge must be that of the applicant for the placer patent, but he is chargeable with knowledge of what is known generally in the community, or what would be disclosed by a reasonable and fair inspection of the premises for the purpose of obtaining title from the government; and an applicant must be held to know of the existence of a tunnel which runs 400 feet under the tract, and of certain veins which it intersects, and which are so distinctly marked as to be disclosed by a casual inspection.

Vein must have value. Value a jury question. A "vein or lode" of mineral deposit, within the meaning of the statute, must be clearly ascertained, and of such extent as to render the lands more valuable and justify their exploitation; but the question as to whether a given vein is of this character is one of fact for the jury, to be determined upon evidence of its dimensions, its general course and direction, its product of metal per ton, and the facility for reaching and working it.

Failure to record explainable. In determining whether a particular deposit disclosed by the running of a tunnel then became a "known" vein, the fact that the persons running the tunnel did not then, or until about two years afterwards, and after the filing of an application for a placer patent, attempt to develop the vein, is not conclusive,

[1]*Sullivan* v. *Iron Silver Co.* 143 U. S. 431.

when the evidence shows that they, as well as all other miners in the community, were at that time in search of a much richer deposit which was generally believed to underlie the territory.

Evidence corrected by instruction. The jury could not have been misled into finding for the vein claimants by the admission of evidence as to this general belief in the existence of a blanket vein, when the court in its charge clearly pointed out that the rights of the parties turned entirely on the known existence of the particular vein disclosed by the tunnel.

In error to the Circuit Court of the United States for the District of Colorado. Affirmed.

On the 20th of February, 1885, plaintiff in error, plaintiff below, filed its complaint in the District Court of Lake county, Colo., in which it alleged that on the 1st day of January, 1884, it was the owner and in possession of a certain tract of land, known as the "William Moyer Placer," consisting of 56.69 acres, the particular description of which was given; and that on the 1st day of December, 1884, the defendant wrongfully entered upon said premises, and ousted the plaintiff from possession thereof, and still wrongfully retained

Known lodes are excluded from placer patent. *O'Keefe* v. *Cannon*, 52 Fed. 898.

Known lodes may be separately patented. *South Star Lode*, 20 L. D. 204.

Known lodes to be excepted must be of such value as to justify work. Value of land greater for farming than mining shows such lode not excepted. *Brownfield* v. *Bier*, 15 Mont. 403; 39 Pac. 461.

Verdict of jury on the facts stated, that the lode was not known to exist, not set aside. *Butte Co.* v. *Sloan*, 16 Mont. 97; 40 Pac. 217.

To be excepted from placer must be of extent and value to justify working. *Casey* v. *Thieviege*, 19 Mont. 341; 48 Pac. 394. *Migeon* v. *Montana Ry.* 18 M. R.—

The location of a lode claim over a placer, in a town site, after patent applied for, is suspicious. *Casey* v. *Thieviege*, *supra*.

There was no exception of known lodes under the original placer Act of 1870. *Cranes Gulch Co.* v. *Scherrer*, 134 Cal. 350; 66 Pac. 487.

[2]As to this date see *Clipper Co.* v. *Eli Co.* 29 Colo. 377: 68 Pac. 286 and observations on same, Mining Rights 11th Ed. 205, 207.

such possession. The defendant answered that the patent for said placer was issued on the 30th day of January, 1880, and contained the following reservation: "That the grant hereby made is restricted in its exterior limits to the boundaries of the said lot No. 300 as hereinbefore described, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, which may have been discovered within said limits subsequent to the date hereof, and not claimed or known to exist at the date hereof; *second*, that should any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, be claimed or known to exist within the above-described premises at the date hereof, the same is expressly excepted and excluded from these presents."

It also alleged that at the time of the location of the placer claim and the survey thereof, and at the time of the application for patent, there was a known lode, vein, and deposit of mineral within the boundaries of said placer, called the "Goodell Lode," and that the patentee had knowledge of its existence. On the application of the plaintiff the case was removed to the Federal Court, and there a replication was filed denying the existence of any known lode or vein at or before the issue of the patent. The case was tried before a jury in November, 1885, which trial resulted in a verdict and judgment for the defendant, and thereupon the plaintiff brought the case here on error.

ASHLEY POND, L. S. DIXON, E. O. WOLCOTT, F. W. OWERS, and JAMES MCKEEN, for plaintiff in error.

T. M. PATTERSON, and C. S. THOMAS, for defendant in error.

Mr. Justice BREWER delivered the opinion of the court.

This and two kindred cases have been before us for consideration for some time. They have been twice argued, the reargument having been ordered by the court of its own motion; and on the second argument, at the like instance, very elaborate and complete models, maps, and photographs were prepared by the respective parties and presented for our examination. The fact is there was an earnest inquiry as to whether the court had not erred in its prior and repeated ruling that a known lode, as named in section 2333 of the Revised Statutes, is something other than a located lode; and also whether, in view of the disclosures made in this, as in prior cases, of the existence of a body of mineral underlying a large area of country in the Leadville mining district, whose general horizontal direction, together with the sedimentary character of the superior rock, indicated something more of the nature of a deposit like a coal bed than of the vertical and descending fissure vein in which silver and gold are ordinarily found, it did not become necessary to hold that the only provisions of the statute under which title to any portion of this body of mineral, or the ground in which it is situated, can be acquired, are those with respect to placer claims. Of course, such conclusions would have compelled a revising of some former opinions, and have wrought great changes in the *status* of mining claims in that district. Because of this we have been very careful, and the investigations in these directions have been earnest and protracted. It would serve no useful purpose to state all the arguments which have been advanced and considered by us. It is enough to announce the results. Our conclusions are, first, in respect to the matter of the known vein, that the reasons so clearly stated by Mr. Justice FIELD, speaking for the court in the case of *Noyes* v. *Mantle*, 127 U. S. 348; 353, 8 Sup. Ct. Rep. 1132, are unanswerable, and forbid an adjudication that the term "known vein" is to be taken as synonymous with "located vein," and compel a reiteration of the declara-

tion heretofore made,—that the term refers to a vein or lode whose existence is known, as contradistinguished from one which has been appropriated by location; and, as to the other matter, that the title to portions of this horizontal vein or deposit, "blanket" vein, as it is generally called, may be acquired under the sections concerning veins, lodes, etc. The fact that so many patents have been obtained under these sections, and that so many applications for patents are still pending, is a strong reason against a new and contrary ruling. That which has been accepted as law and acted upon by that mining community for such a length of time should not be adjudged wholly a mistake, and put entirely aside, because of difficulties in the application of some minor provisions to the peculiarities of this vein or deposit. With this explanation of the reasons for the long delay in the decision of this case, we pass to the special matters in controversy.

The questions presented by the pleadings to be tried were whether there was a vein or lode within the territorial boundaries of the placer; and, if so, whether it was a known vein or lode, within the meaning of section 2333. The plaintiff, to maintain its case, offered in evidence simply its patent and other matters of record, together with parol proof of boundaries. By this record evidence it appeared that the application for the placer patent was made on the 13th of November, 1878; that entry and payment were made on the 21st of February, 1879; and that the patent was issued on January 30, 1880. The location certificate of the Goodell lode was dated March 10 and recorded March 11, 1879, reciting a location on February 1, 1879. After the introduction of this testimony, the plaintiff rested, and by it a *prima facie* title to the whole placer claim was established. The location of the Goodell lode was some months after the application for the placer patent. The defendant, to maintain its claim, offered the testimony of several witnesses,—testimony which

established beyond any doubt that in 1877, and more than a year before any proceedings were initiated with reference to the placer patent, the grantors of defendant entered upon and ran a tunnel some 400 feet in length into and through that ground which afterwards was patented as the placer tract, and that in running such tunnel they intersected and crossed three veins, one of which was thereafter, and in 1879, located as the Goodell vein or lode. The vein thus crossed and disclosed by the tunnel was from 75 to 78 feet from its mouth, of about 15 inches in width, with distinct walls of porphyry on either side,—a vein whose existence was obvious to even a casual inspection by any one passing through the tunnel.

With this general statement, we notice the two or three matters which are the special objects of contention; and, first, it is said that the court erred in giving this instruction:

"If there was a lode in that territory, and it was known to Moyer as an existing lode at this time,—and by this time I mean the 1st of February, 1879, or at the time these locations were said to have been made,—and the lode had been previously discovered by the locators of these claims, then the placer patent is not sufficient to convey them. In other words, they are excepted by the terms of this statute from the provisions of the patent, and the owners of that title now have no right to them."

In other words, the court ruled that if the vein was known to the placer patentee at or before entry and payment, although not known at the time of the application for patent, it was excepted from the property conveyed by the patent. Into this ruling the court was doubtless led by the language of the patent, which in terms exempts all veins or lodes known to exist at the date thereof,—that is, the date of the issue of the patent. In this respect there was error. The time at which the vein or lode within the placer must be known in order to be excepted from the grant of the patent

is, by section 2333, the time at which the application is made. Its language is: "An application for a patent for such placer claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim. *Mining Co.* v. *Reynolds*, 124 U. S. 374; 8 Sup. Ct. Rep. 598; *U. S.* v. *Mining Co.* 128 U. S. 673, 680; 9 Sup. Ct. Rep. 195. There was therefore a technical error in this instruction of the court, but one which obviously wrought no injury to the substantial rights of the plaintiff, because there is not a *scintilla* of testimony, a suggestion even, that between the year 1877 and the time of entry and payment there was any work done or discovery made on the placer ground in respect to the Goodell lode or in the tunnel. Everything that was done had been done in 1877; everything that was known at the time of the patent was known in 1877; so that the error of date in the charge was one not affecting the substantial rights of the plaintiff. If at the time of the entry there was a known vein, there was the same vein and the same knowledge in 1877, and before the application.

The second matter is this: Was there a known vein at the time of the application for a patent, within the meaning of section 2333? It was not then a located vein or lode, and the case was evidently tried by the plaintiff upon the theory that unless it was a located vein it was not a known vein; but that, as we have seen, is not a correct interpretation of the statute. It is enough that it be known, and in this respect, to come within the intent of the statute, it must either have been known to the applicant for the placer patent or known to the community generally, or else disclosed by workings, and obvious to any one making a reasonable and fair inspection of the premises for the purpose of obtaining title from the government. The proof abundantly establishes that within the last description the vein was a known vein. The placer tract was a small one of 56 acres. The tunnel ran 400 feet under-

neath its surface. At its mouth there was a large dump of earth taken from it. No one had a right to enter that ground as placer mining ground, unless he had made such an inspection as to enable him to make affidavit that it was adapted to such mining. No examination could have been made without disclosing the existence of this tunnel. That was a fact upon the surface, obvious to the most casual inspection. No one could be heard to say that he had examined that ground in order to ascertain that it was suitable for placer mining, and in such examination had not discovered the existence of this tunnel. It was not a little excavation, with a few shovelfuls of dirt at its entrance. The pile of dirt was evidence which no one could ignore, that it was a long tunnel, running far into the earth. It was in mining ground, as all this territory was believed to be, and therefore an excavation likely to disclose veins. As an applicant for a placer patent was chargeable with notice of the existence of the tunnel, so, also, was he chargeable with notice of whatever a casual inspection of that tunnel would disclose. He would not be heard to say: "I did not enter and examine this tunnel, and therefore know nothing of the veins apparent in it." The government does not permit a person to thus shut his eyes and buy. If there be a vein or lode within the ground, it is entitled to double price per acre for it and the adjacent 50 feet, and, with such interest in the price to be paid, it rightfully holds any applicant for a placer patent chargeable with all that would be disclosed by a casual inspection of the surface of the ground or of such a tunnel. The applicant must be adjudged to have known that which others knew, and which he would have ascertained if he had discharged fairly his duty to the government. Surely under the testimony the jury was warranted in finding that this was a known vein.

Another question is whether this was such a vein bearing gold, silver, cinnabar, lead, or other valuable deposit as that a discoverer could obtain title thereto under sections 2320 and

2325. It is undoubtedly true that not every crevice in the rocks, nor every outcropping on the surface, which suggests the possibility of mineral, or which may, on subsequent exploration, be found to develop ore of great value, can be adjudged a known vein or lode, within the meaning of the statute. As said by this court in the case of *U. S.* v. *Mining Co.* 128 U. S. 673, 683; 9 Sup. Ct. Rep. 195: "It is not enough that there may have been some indications, by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver, or other metal, to justify their designation as 'known' veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation." And yet in the case of *Mining Co.* v. *Cheesman*, 116 U. S. 529, 536; 6 Sup. Ct. Rep. 481, this court sustained an instruction as to what constitutes a lode or vein, given in these words: "To determine whether a lode or vein exists, it is necessary to define those terms; and, as to that, it is enough to say that a lode or vein is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain. In this definition the elements are the body of mineral or mineral-bearing rock and the boundaries. With either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied. On the other hand, with well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and if in such fissure ore is found, although at considerable intervals and in small quantities, it is called a 'lode' or 'vein.'"

It is, after all, a question of fact for a jury. It cannot be said, as a matter of law in advance, how much of gold or silver must be found in a vein before it will justify exploitation and be properly called a "known" vein. In this case the only testimony offered upon this question was that by the defendant. John Hayes, one of the parties who dug this tunnel, testified that his brother was the territorial assayer of Colorado at the time; and that he assayed the ore from this vein several times, and got from a trace to three-quarters of an ounce of gold. Three-quarters of an ounce would be fifteen dollars a ton. That of itself may not be decisive as to whether the vein justified exploitation. And yet the proofs filed in the land department, under which the patent to this entire placer claim was obtained, show no such amount of mineral. What is sufficient to obtain title from the government is certainly sufficient to demand consideration by a jury. We are told by counsel for defendant that the Father de Smet mine at Deadwood produces ore that runs less than five dollars to the ton, yet is of immense value and constantly worked, because of the large quantity of this low-grade ore. So, here, the amount of the ore, the facility for reaching and working it, as well as the product per ton, are all to be considered in determining whether the vein is one which justified exploitation and working. Beyond this, the defendant produced Fred G. Bulkley, a civil and mining engineer, who testified to an examination of the tunnel, describing the various fissures and veins, and produced before the jury some of the ore taken from this vein. The jury, therefore, had before them samples of the ore from the vein; they were advised as to its dimensions, as to its general course and direction, and as to the actual results of several assays; and upon this testimony they found that it was a known vein.

If it be said that the conduct of the parties who ran the tunnel makes against the present contention, in that when they reached this vein they did not stop and develop it, but on the

contrary proceeded with the tunnel, and even after they had finished their work therein did not immediately commence to develop it, a satisfactory answer is found in the testimony. It appears that there was a prevalent belief that a rich blanket vein was underlying the entire country, and this was the object of pursuit by all. The placer claim of the plaintiff was evidently not taken for placer mining, but because outside and at a short distance therefrom it had workings on this blanket vein; and, believing that such vein at a slight dip extended under the placer ground, title was sought to the latter in order to prevent intrusion upon the former. In like manner they who ran the tunnel, having a claim on adjacent ground, were seeking the same blanket vein, which, wherever reached, had been found of great thickness and richness. All minor matters and less promising veins were subordinated to the search for this one rich vein. The conduct of the grantors of both of the parties was determined by a belief in the existence of this underlying vein; but whether their belief in its existence was well founded or not, whether their conduct in view of such belief was wise or not, are matters which do not detract from the credibility to be given to the testimony as to the width and character of this vein. We are of opinion, therefore, that the finding of the jury that this was a "known" vein within the scope of section 2333 was based upon sufficient testimony, and cannot be disturbed.

It is urged that there was error in admitting testimony as to this belief in an underlying vein, because the jury may have found against the plaintiff on the ground of the supposed existence of such a vein. It may have been competent as explanatory of the conduct of the parties, as indicated above; but, whether this be so or not, the attention of the jury was directed by the court to the vein disclosed by the tunnel as the known vein upon which the rights of defendant rested. It made no reference to this supposed underlying vein, but did say:

"The evidence tends to prove that the discovery of mineral in these claims was made in a tunnel some time in 1877, I believe. The locations were not made on the surface of the ground until 1879, about the 1st of February. That was after the application for patent and before the entry, which was about the 21st of February, 1879, and, of course, before the patent was issued.

"If there was a lode in that territory, and it was known to Moyer as an existing lode, at this time—and by this time I mean the 1st of February, 1879, or at the time these locations were said to have been made—and the lode had been previously discovered by the locators of these claims, then the placer patent is not sufficient to convey them."

And then, in closing the charge, it added:

"I think that is all, gentlemen, that there is in the case. I do not know that it is necessary to repeat it again—that the plaintiff's title must prevail unless it appears to you from the evidence that there was a lode existing in the ground, and that Moyer knew it at the time of making his entry and obtaining his patent, and that a location had been made upon it in a general way; that there was a certificate made; that there was a discovery of mineral within the claims; and that the lode was staked upon the surface and the like."

As there was no pretense of any discovery of this supposed underlying vein, obviously the attention of the jury was directed solely to the vein disclosed in the tunnel.

These are all the questions we deem important, and in the record there appears no substantial error.

The judgment will therefore be affirmed.

Case No. 3, between the same parties, presents the same questions, and the same judgment of affirmance will be entered therein.

Mr. Justice FIELD, with whom concurred Mr. Justice HAR-

LAN and Justice BROWN, filed dissenting opinions, 143 U. S. 407, a note to which, p.413, contains the material testimony of the witnesses as to what character of vein the tunnel disclosed.

LAST CHANCE MINING CO. v. BUNKER HILL & S. MINING & CONCENTRATING CO.

(49 Federal 430. Circuit Court, District of Idaho. February 29, 1892.)

[1]**Change of place of use after second appropriation.** The appropriator of water, to be used at a specified place for the purpose of operating machinery and other works, after so using and returning it to its original channel, cannot change the place of use, to the damage of a subsequent appropriator lower down on the stream.

Facts of the case to which above rule was applied. Water was carried by a ditch to defendant's ore mill, there used and returned to the stream. Later in time and below on the stream it was tapped by plaintiff and taken to his mill. Afterwards defendant made a ditch above plaintiff's point of diversion and led the water around and below him.

W. B. HEYBURN, for plaintiff.

MCBRIDE & ALLEN, for defendant.

BEATTY, District Judge. This cause is submitted upon an agreed statement of facts, from which it appears that the defendant, during the months of February, April and May, 1886, located three water-rights on Milo creek, in Shoshone County, Idaho, the water of which was conducted by separate ditches to defendant's ore milling plant, known as the "Old Concentrator"; that after being there used for the purpose of concentrating the ore from defendant's mine, and running the machinery connected with the mine and works, it was turned back into the natural channel of said creek;

[1]The miner may change the point of diversion or the place of use. *Maeris* v. *Bicknell*, 1 M. R. 601. *Strickler* v. *Colo. Springs*, 16 Colo. 61; 26 Pac. 313.

He may take it by a new and different ditch. *Jacob* v. *Lorenz*, 98 Cal. 332; 33 Pac. 119; *Greer* v. *Heiser*, 16 Colo. 306; 26 Pac. 770.

"All the cases reviewed except the case of *Davis* v. *Gale* (4 M. R. 604) make the right to make such change dependent upon the condition that the change shall not injuriously affect others." *Fuller* v. *Swan River Co.* 16 M. R. 258.

that it thereafter continued to flow therein unclaimed, until in the month of June, 1889, the plaintiff, at a point on said creek some distance below where defendant so returned it, located 2,000 inches thereof, and thereafter continued to use it for milling purposes in concentrating the ore from its mines, until July, 1891, when the defendant, at a point on one of its ditches above its mill, so constructed a flume as to carry all the water of said creek, during the season of low water, around and beyond the place of appropriation and diversion by plaintiff, and thereby prevented plaintiff from any use thereof; and that all such premises and water-rights are situated upon the public lands of the United States. Under such circumstances, can the defendant, as the prior appropriator, now so change the place of use of such water as to deprive the plaintiff thereof? is the question for determination.

With the first development of the Pacific coast by the American pioneer, water became an indispensable factor in mining, agricultural, and other material interests, and with its early use began the formulation of rules for its regulation. Those rules were by the courts and legislatures first followed, then adopted as laws, and subsequently were ratified by Congress by act of 1866. Among the first of such rules, which has ripened into law, was that favoring the prior actual appropriation made for some useful purpose. The use, however, was to be a reasonable one, and, as far as possible, be consistent with a use by others. Prior possession did not imply authority to take what was not needed, or, by prodigality, waste what others might profitably utilize. That such equitable rule might be enforced, it became necessary that some notice, or acts equivalent to notice, should be made of the claim. To this in time were added the positive requirements of a written notice, with full details of the amount, nature, and place of diversion and use. These general principles were, prior to the inception of the rights involved in this action, incorporated into the laws of this state, which, in

pursuance of those of Congress, must govern all water-rights located upon the public lands, and streams of the general government. By section 3160, Rev. St. Idaho, it is provided that the appropriator of water must post a "notice in writing * * * stating therein" the amount claimed, "the purpose for which he claims it, and the place of intended use." This requirement is designed less for his protection than as a notification to others of what is left unclaimed which they may appropriate. It would follow that when an appropriation is made with full knowledge of prior rights, and in entire subordination thereto, it is as much entitled to protection against the aggressions of a prior claimant as the latter would be against subsequent intrusions. Also it is provided, by section 3156 of said statute, that "the appropriation must be for some useful or beneficial purpose, and when the appropriator ceases to use it for such purpose the right ceases." These sections together would seem to lead to the conclusion that, when an appropriator ceased to use the water at the place and for the purpose by him designated, he would be precluded from using it elsewhere or otherwise, and his rights concerning it would terminate. I think, however, a more liberal construction is justified, and, to render these rights of any permanent or material value, is demanded. The use for which the water is appropriated and to which it is applied is an important factor in the construction of the statute. The controlling question, in any case, is whether subsequent locators have had such notice of prior rights, and their extent and effect, as would guard them against making invalid locations.

In illustration, suppose some certain amount of water is appropriated to be used as a power by its conversion into steam; or, by combination with other elements, is to be converted into articles of merchandise; or to be used upon some certain tract of land for the purpose of irrigation. Should the appropriator be precluded from thereafter changing either

or both—its use, or the place thereof? The reply must be in the negative, for in all such cases the purpose of the appropriation is such that no subsequent appropriator can thereby be misled to his injury. Distinct notice is given in such cases, not only that so much water is drawn from the public supply, but that its appropriation is such that it cannot be used a second time. It is a notice that so much water is practically destroyed,—is eliminated from existence as water. A subsequent locator has actual notice that this amount of water is withdrawn from all public claim, is absorbed, and has become a vested right. He cannot base any claim upon it, or upon any expectation that, some time in the future, it will become the subject of appropriation. Should such prior right be subsequently forfeited, he gains nothing thereby, as his rights are measured alone by what he could, and actually did, claim at the time of his appropriation. Neither does he lose anything, nor is he in any way damaged, should the first appropriator change his use, or the place thereof, for, in either event, he still has left all he ever claimed, or was entitled to claim. The appropriation of water for placer mining purposes, at some specified place, involves a somewhat similar principle. It is such an actual appropriation of a definite amount, and for such purpose, as, in the nature of things, must operate as a notice to all that its place of use must, from time to time, as the ground is worked, be changed. Should one use the water after it passes from the works of the prior claimant, he must do so at his own risk, and he cannot complain that changes are made which he had full notice would likely occur. In this action, however, the facts are quite different. In 1886 the defendant located the water, specifying that it was to be used at its mill for the purpose of power in operating machinery and in concentrating ores, and in pursuance of such notice conducted it to such mill, and, after there so using, returned it to the original channel of the stream from which it had been taken, and practically undiminished

in quantity or deteriorated or changed in quality. The use made of it was purely usufructuary, and in no sense partaking of the nature of ownership in the water. The defendant, by its declarations and acts, in effect said to the world that the only use it had for the water was at the place and in the manner specified, and that, when so used, it had no further claim upon and abandoned it. Under such circumstances, there was neither direct nor implied notice that it would be used elsewhere or for other purposes by defendant. On the contrary, the public was justified in believing that defendant had made the only use thereof intended; that the same would continue; and that in the future it would be returned to the creek as it had been. Would it not follow, from such facts, that plaintiff, in claiming the water after its return to the creek, was fully justified? If justified in such claim, then protection thereof must follow. If the defendant's position is sustained by the law, it would follow that the prior appropriator would, in all cases, so absolutely control the water, to the extent of such appropriation, that no other person could thereafter attempt any permanent use of it, except at great risk of loss, even when such use would not damage the first appropriator. Suppose, in this case, the stream below defendant's mill were lined with ore-mills, all operated by the same water, as it passed from the wheels of one mill to the next below, and all by appropriations subsequent to defendant. Upon defendant's theory, all such mills may be closed, and utterly destroyed, whenever the latter concludes to modify its plans, and divert the water elsewhere. Such a rule, I am firmly convinced, is counter to the policy of the law. Instead of developing the country, it would block its progress. Instead of utilizing, as generally as possible, nature's elements for the public good, it would subject them to the arbitrary will of any individual who might first assume a claim to them. It would be an extension of the maxim, "first in time, first in right," far beyond the limits of equity or justice. In this

case the facts are not limited simply to the appropriation of the water, its use and return to the stream by defendant, but such *status* continued for over three years before plaintiff located, and thereafter continued for over two years to use it, without objection by defendant, and before the latter attempted, through the means stated, to interfere therewith.

Even if defendant's original claim of the water, its use and return to the stream, without any notice or reservation, direct or implied, of any other use, did not constitute a release of further claims, it certainly should be held that the continuation of such *status* for over five years must operate as an abandonment of any further or different claim than that exercised. In view of all the facts, the doctrine urged by the defendant cannot be acceded to, unless it is sustained by most potent judicial authority. From those cited, and from others, it appears, in *Maeris* v. *Bicknell*, 7 Cal. 261, that the court distinctly held that a prior appropriator could change the place of use as against a subsequent appropriator, but how this question was involved is not apparent; for the important question, as stated by the court—and the only one shown by the facts—was whether the plaintiff, who had cut a ditch for drainage, could, after defendants had cut another to appropriate the water, use the water as against defendants. It was held he could not, because, prior to defendant's appropriation, he had neither used nor avowed any intentions to use it. In *Davis* v. *Gale*, 32 Cal. 26, and *Correa* v. *Frietas*, 42 Cal. 342, the prior appropriation was for the purpose of working placer mining ground, and it was held that the place of use could be changed as against subsequent appropriators. In *Woolman* v. *Garringer*, 1 Mont. 535, the defendants having located water to be conducted 27 miles for mining purposes, the plaintiffs, within three months thereafter, located the same, upon the theory that defendants had not made an actual use thereof, or conducted it from the stream, or given due notice of their intention to do so, prior to plaintiffs' appro-

priation. The cases above cited were quoted and approved, and the court further added that—

"The notice posted on the stream, of the appropriation of so much water for general mining purposes, and the immediate entering upon the * * * construction of dam and ditch, * * * were sufficient to put the plaintiffs on their guard, * * * and to apprise them of * * * defendants' superior rights. The plaintiffs could acquire no other than a mere privilege or right to the use of the waste water, or, at most, but a secondary and subordinate right to that of the first appropriators, and only such as was liable to be determined by their action at any time unless the water had been turned back into the original channel after it had been used, and answered the purpose of the first appropriators, without any intention of recapture, and thereby became *publici juris*."

In *Eddy* v. *Simpson*, 3 Cal. 249, the defendants, after using water for mining purposes, let it escape into plaintiffs' creek, and subsequently attempted to reclaim it, which it was held could not be done after plaintiffs began using it. In *Ortman* v. *Dixon*, 13 Cal. 36, the defendants first appropriated the water as a mill-power. Plaintiffs subsequently, by a ditch above the mill, used the water for mining purposes when the mill was not running. Still later defendants took out a ditch above plaintiffs, and conducted the water away for mining purposes. The court held defendants could not thus change its use; that—

"The measure of the right, as to extent, follows the nature of the appropriation, or the use for which it is taken. If A. erects a mill on a running stream, this shows an appropriation of the water, for the mill; but if he suffers a portion of the water, or the body of it, after running the mill, to go down its accustomed course, we do not see why persons below may not as well appropriate this residuum as he could appropriate the first use. It may be true, as * * * argued, that he may change the use, and even the place of using; but the concession does not help the argument, for the question is not how he may use his own, but what is his own."

In *Water Co.* v. *Powell*, 34 Cal. 109, the plaintiff having first constructed a dam to utilize the water it claimed, the defendants then took up some mining ground on the creek above such dam. The bed of the creek became so filled with *debris* from the mining operations of third parties that it was necessary for plaintiff to raise its dam to make any use of the water it

had first appropriated, and this resulted in backing the water over defendants' mining ground. In holding that plaintiff could not so raise its dam, the court said:

"Its right to appropriate and use said water in the manner adopted, and to the extent of the appropriation, would not prevent other parties from acquiring rights in the surplus water, or in the bed and banks of the stream, or in the adjacent lands, to any extent which should not interfere with the rights before acquired. * * * When the right has once vested in the defendants, the plaintiff is no more justified, by extending its own claim, or changing the measure of appropriation, or interfering with the full enjoyment of the right vested in the defendants, than defendants would be in encroaching upon the prior rights of plaintiff."

In *Proctor* v. *Jennings*, 6 Nev. 87, it is held—

"That the rights of each [appropriator] are to be determined by the conditions of things at the time he makes his appropriation. So far is this rule carried that those who were prior to him can in no way change in extent their use to his prejudice, but are limited to the right enjoyed by them when he secured his."

It may be urged, as to some of the above noted cases, that they only determine that subsequent rights cannot be molested, and do not establish any rule by which it can be held, in this case, that plaintiff's appropriation was lawful. Certainly it must be conceded that, if it was unlawful, it cannot be protected, and defendant may do with the water what it will; but, without restating the facts, if under them the plaintiff was not justified in making the claim it did, it would be difficult to imagine a case in which the water of a stream, once used as it was by defendant in this case, could ever be safely appropriated by a second party for any use whatever.

When defendant's water locations were made, section 3 of the act approved February 10, 1881 (11 Sess. Laws Idaho 267) was in force, as follows:

"The appropriator, or his or their successors in interest, may change the place of diversion, if the rights acquired by others are not thereby interfered with, and no injury to others therefrom result, and may also extend any ditch, canal, flume, pipe, or other conduit to points or places beyond such as may have been designated or first used, saving the rights which may have accrued prior to such extension."

The plaintiff claims that, as defendant's rights were acquired under this section, its rights now are so controlled, as against plaintiff, by the last clause, that no change of the place of use can be made. But long before plaintiff made its location this section was revised into section 3157, Rev. St. Idaho, as follows:

"The person entitled to the use may change the place of diversion, if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct, by which the diversion is made, to places beyond that where the first use was made."

Whatever rights this revised section confers would accrue to defendant, and the defendant now relies upon this section in support of its right to make the change complained of. This position is fortified by the fact that the clause in the old statute prohibiting such change is omitted in the new. While it is evident that the legislature was simply aiming to exactly follow and adopt section 1412, Civil Code Cal., I think that it designed, by the statutory change, to permit the prior appropriator to change the place of use, as against a subsequent appropriator; but that it intended this to be done in all cases, regardless of the facts, is quite a different proposition. I still think it was designed that this extended liberty should include those cases, as above stated, in which the use of the water amounted to its absorption, or it was such as to imply notice to all that such change could be reasonably expected, and to exclude cases like the present, where it is appropriated and used for a specific purpose, and then abandoned. That the waters of the country may be monopolized by the few first comers, when they may be made to serve the many, would be an imputation of such improvident and inequitable legislation as should not be indulged, save upon overwhelming conviction. It must be concluded that plaintiff is entitled to protection for its water-right claim, its right thereto quieted and defendant perpetually enjoined from interfering therewith, and *it is now so ordered.*

H. A. HAEUSSLER v. MISSOURI IRON CO. ET AL.

(110 Missouri 188; 19 S. W. 75. Supreme Court, Div. 2. March 2, 1892.)

After disseizin. One tenant in common cannot maintain an action for partition of land against his co-tenant where he has been disseized.

[1]**Agreement to never part.** An agreement between co-tenants of land that neither they nor their heirs or assigns shall ever institute suit for the partition of the property is void as being an unreasonable restraint on the enjoyment of property.

[2]**Partition subject to outstanding lease.** Possession of land by a tenant under a perpetual mining lease is no objection to a partition suit between the co-owners, subject to the rights of the tenant.

Appeal from Circuit Court, Dent County; C. C. BLAND, Judge.

Action by H. A. Haeussler against the Missouri Iron Company and others for partition. Judgment for defendants. Plaintiff appeals. Reversed.

BROADHEAD & HEZEL, J. MORCHARD, and E. A. SEAY, for appellant.

L. B. WOODSIDE, for respondents.

THOMAS, J. This is a proceeding for the partition of the S. W. ¼ and the N. W. ¼ of the S. W. ¼ and the N. ½ of the S. E. ¼ of section 24, township 34, range 6 W.. situated in Dent county, containing 280 acres.

This record discloses the following facts: On the 4th day of June, 1870, C. C. Simmons and W. P. Billings, being seized of said lands in fee, by separate conveyances conveyed two

[1]Compare *Coleman* v. *Coleman*, 11 M. R. 183.

[2]*Jordan* v. *McNulty*, 14 Colo. 280; 23 Pac. 460.

On partition sale minimum price was fixed at $200,000, afterwards reduced to $75,000 and still later removed entirely; property sold for $4,500. Case refers to the great fluctuations in value of mining property, holding that the small price raised no presumption of fraud. *Mootry* v. *Grayson*, 104 Fed. 613.

undivided fourths thereof in fee to Alexander L. Crawford and William L. Scott, each of which conveyances contained this stipulation: "And it is also further mutually covenanted and agreed by and between the parties to this conveyance that neither they nor their heirs or assigns, nor any or either of them, shall or will ever institute or commence, or cause to be instituted or commenced, any proceedings, in partition or otherwise, in law or equity, to obtain or procure a partition, allotment, or division, or sale of so much or of such parts or portion of said lands as have been leased for mining purposes to said parties of the second part by deed of lease bearing even date herewith, and made and executed by said Walter P. Billings and Cyrenius C. Simmons, and duly recorded in the office of the recorder of deeds of said Dent County, without the written consent of all the parties interested in said property at the time of the commencement of such proceedings, and made a part of the record thereof."

The "deed of lease" mentioned in the foregoing stipulation was an indenture which witnessed that the said Simmons and Billings, as parties of the first part, granted, bargained, sold, and conveyed perpetually and forever to said Crawford and Scott, as parties of the second part, their heirs, assigns, and legal representatives, "the sole and exclusive right and privilege to enter upon and into said lands for the purpose of searching for, digging, mining, quarrying, and taking away all the iron ore which may be upon or in said lands; and also for the purpose of smelting and manufacturing of iron on said lands, to any extent that the parties of the second part, their heirs, assigns, and legal representatives, may deem advisable," with the proviso that "such parts or portions of said pieces or parcels of land as do not contain iron ore, and such as shall not be needed or used by said parties of the second part for mining, storing waste material, railroad tracks and switches, manufacturing purposes, or for the erection of buildings, machinery, and fixtures required or needful for the use

of said parties of the second part in carrying on their business aforesaid, shall be and remain in the joint possession, and for the mutual use, benefit, and enjoyment, of all the aforesaid parties hereto, according to their respective interests and shares therein."

It was provided by this deed of lease that said Crawford and Scott, their heirs, assigns, or legal representatives, should pay to said Simmons and Billings, their heirs, assigns, or legal representatives, the sum of 12½ cents per ton gross of 2,240 pounds for the one-half of all the iron ore that should be mined, dug, or quarried and taken away, used, or sold from said lands; the payments to be made quarterly, on the 15th days of January, April, July and October in each year. Crawford and Scott agreed to organize a corporation under the laws of Missouri for the purpose of carrying on mining operations on said lands, which was done, the name of the corporation being "Missouri Iron Company," to which said Crawford and Scott in due time conveyed the interests in said lands acquired by them by virtue of the said conveyances and deed of lease. This corporation took from these lands from 1873 to the time of the trial of this cause, in October, 1889, 200,000 tons of iron ore.

The record shows the interests of the parties other than the Missouri Iron Company in said lands to be as follows: Plaintiff, one-fourth; defendant Cook or his representatives, one-eighth; and Walter and Maud Billings, one-sixteenth each; all subject to the terms and conditions of the conveyances and deed of lease executed by Simmons and Billings to Crawford and Scott, as above set forth.

Defendant the Missouri Iron Company resisted the partition of the lands on two grounds: (1) It claimed to be in the adverse possession of them; and (2) it had not consented in writing to such partition as provided by the conveyances of Simmons and Billings to Crawford and Scott, dated June 4, 1870.

Defendants Maud and Walter Billings were minors, and appeared by guardian *ad litem*, and Cook's representatives made default.

Upon these facts the court refused partition of the lands, and the plaintiff appealed. No instructions were asked or given.

I. One tenant in common cannot maintain an action for partition against his co-tenant, where he has been disseized. *Wommack* v. *Whitmore*, 58 Mo. 448. While it is conceded that the Missouri Iron Company is in the actual possession of the lands, partition of which is sought in this case, we do not think such possession is adverse to plaintiff's interest in them; nor does it amount to an ouster of plaintiff. Three distinct interests in the lands are created by the conveyances and deed of lease: (1) All the parties are seized of the lands in fee as tenants in common, subject to the mining right of the Missouri Iron Company; (2) the Missouri Iron Company owns in severalty the right to mine the iron ore on and in said lands, and this right is sole and perpetual; (3) plaintiff Cook's representatives and Maud and Walter Billings are owners in common in perpetuity of the royalties to be paid under the provisions of the deed of lease. The possession of this property held by the Missouri Iron Company is under the deed of lease, and is not, therefore, antagonistic or adverse to, but consistent with the interests of the other parties therein.

II. The real controversy here turns upon the construction and effect to be given the stipulation against the institution of partition proceedings without the written consent of all the parties, contained in the conveyances of Simmons and Billings to Crawford and Scott, dated June 4, 1870. The iron company insists that it is valid and binding, while plaintiff, on the other hand, claims that it is an unreasonable restraint upon the alienation of the property, and upon the right of each party to have partition, and the use and enjoyment of his interest in severalty, and therefore void. Plaintiff concedes

in his argument in this court that the mining right is not joint property, but is held in severalty by said company, and hence is not the subject of partition; and this seems to be the theory of his petition. We will therefore take it for granted that plaintiff seeks partition or sale of the lands, subject to such mining right.

This brings us to the discussion of the question, does the stipulation against the institution of proceedings for the partition of these lands without the written consent of all the parties preclude plaintiff from maintaining this action? It must be noted at the threshold of this inquiry that the stipulation in question is not a restraint upon the alienation of the lands. The several owners are left free to dispose of their interests in any manner they see proper. The only restraint is upon the right of severing the interest of one owner from the others by a proceeding *in invitum*. Is this restraint unreasonable, and void because unreasonable? This stipulation is a perpetual inhibition of partition, the language being that neither the parties nor their heirs or assigns shall ever institute proceedings for partition without the written consent of all the parties.

The civil law refused to enforce agreements perpetually waiving the right of partition. Domat says: "It is always free for every one of those who have anything in common among them to divide it, and, although they may agree to put off the partition to a certain time, yet they can make no such agreement as never to come to a partition; for it would be contrary to good manners that the proprietors be forced to have always an occasion of falling out by reason of the undivided possession of a common thing." Domat's Civil Law by Strahan, pt. 1, bk. 2, tit. 5, Sec. 11, Par. 9.

And Mr. Freeman, in his work on Co-Tenancy & Partition, (section 442), maintains that this is the rule in England and the United States. Restraints and fetters upon the alienation and enjoyment of property are opposed to the common law,

and especially to the jurisprudence of to-day, which, in the United States, at least, has almost wholly lost the spirit and genius of the feudal system and feudal tenures. 9 Amer. Law Reg. (N. S.) 393, 457. Primogeniture and estates tail, with all their incidents, find but little favor in the laws of this century.

The right of partition is an absolute right, which yields to no consideration of hardship or inconvenience. Freem. Co.-Ten. § 443. Anything that militates against this right is repugnant to the essential characteristics of co-tenancy. *Mitchell* v. *Starbuck*, 10 Mass. 11. And the tendency of our times is to greater freedom of sale and transfer of property, unfettered by conditions or limitation of the right of alienation.

In the case at bar, if the right of involuntary partition of these lands does not exist now, it will not exist 500 or 1,000 years hence. In time, by the sale and descent of undivided interests, the owners would become so numerous, and the interests so small, that the estate would be almost, if not wholly, valueless. Here is a tract of land containing 280 acres, which may be suited to agricultural and various other purposes, and the joint owners may want to have their interests set off, so that they can utilize them for such purposes. The partition in kind or sale under partition proceedings of these lands subject to the mining right, instead of being detrimental, would be beneficial, to the owner of that right, for it is more difficult and unsatisfactory to deal with many than one. The many can exercise control over the lands subject to the mining right, and that is all one owner could do. Hence there is no reason why the title to the property subject to this right should not be vested in one person, but many reasons why it should be so vested, and we hold that the stipulation in question, as applied to the title to these lands, subject to said mining right, is an unreasonable restraint of their enjoyment and use, and therefore void.

The judgment is reversed, and the cause remanded, with directions to the Circuit Court to decree that partition of the lands be made subject to said mining right, and, if this interest in the lands cannot be divided in kind without great prejudice to the owners, that it be sold as provided by statute. The decree of partition must also specifically reserve the right to the royalties on the iron ore to be paid under the provisions of the deed of lease to plaintiff Cook's representatives and Maud and Walter Billings, their heirs and assigns, forever. This right is also subject of partition, but, said company having no interest in it, it cannot be disposed of in this proceeding except by consent of all parties, and then only by a separate sale.

All concur.

LARKIN v. UPTON.

(144 U. S. 19. Supreme Court. March 14, 1892.)

A special finding controls a general verdict.

If findings are susceptible of two constructions that one will be preferred which is consistent with the verdict.

An apex is not a point but a line.

[1]**A discovery disclosing, and the lines of the claim including,** any part of the width or apex of the vein is sufficient upon the point of legal disclosure of the vein within the limits of the claim.

Prior to March, 1882, plaintiffs in error, defendants below, filed their application in the United States land office at Helena, Montana, for a patent to the Smelter lode claim. Defendants in error, plaintiffs below, "adversed," claiming as owners of a conflicting location, called the Comanche lode claim, and thereafter commenced this action in the District Court of the Second Judicial District of the Territory of Montana to determine the right of possession to the disputed territory, an area, as alleged, of seven and seventy-nine one-hundredths acres. There were two trials in the District Court, in each of which the verdict and judgment were in favor of the plaintiffs. The first judgment was reversed by the Supreme Court of the Territory, and a new trial ordered. 5 Montana, 600. The second judgment was affirmed by that court, 7 Montana, 449, which judgment of affirmance was brought to this court by writ of error.

Mr. W. M. STEWART (with whom was Mr. M. KIRKPATRICK on the brief) for plaintiffs in error.

Mr. S. S. BURDETT and Mr. W. W. DIXON (with whom was Mr. M. F. MORRIS on the brief) for defendants in error.

Mr. Justice BREWER delivered the opinion of the court.

[1] *Empire State Co.* v. *Bunker Hill Co.* 114 Fed. 417.

The first judgment was reversed by the Supreme Court of the Territory, on the ground that there had been no discovery of a vein or lode within the Comanche territory at the time of the location of that claim. Immediately north of the Comanche was the Shannon claim, which at the time of the commencement of this suit had been surveyed and patented; and it appears from the opinion of the Supreme Court, that at the first trial the testimony showed that the discovery shaft of the Comanche was wholly within the limits and boundaries of the Shannon claim. The contest at the second trial was as to the position of that discovery shaft and of the apex of the vein disclosed by it. Unquestionably if not on the boundary line between the Comanche and Shannon claims, the shaft was very close to it. The testimony of the defendants tended to show that it was wholly on the Shannon claim; that of the plaintiffs, that it was partly on both claims, extending some 19 inches in width into the Comanche claim, and that the apex of the vein was within the limits of these 19 inches.

The jury returned a general verdict for the plaintiffs, and also made certain findings of fact at the instance of the respective parties. It is doubtless true that where special findings are irreconcilable with a general verdict, the former control the latter; and upon this rule plaintiffs in error rely for a reversal. It is also true that if the findings are fairly susceptible of two constructions, one upholding and the other overthrowing the general verdict, the former will be accepted as the true construction, because it will not be presumed that the jury had different intentions in the findings and in the verdict. *St. Louis & San Francisco Railway Co.* v. *Ritz*, 33 Kansas 404. So that if the meaning of these findings be doubtful, we should adopt that which conforms to and upholds the verdict.

It is unquestioned law that the top or apex of a vein must be within the boundaries of the claim in order to enable the locator to perfect his location and obtain title. Turning to the findings, these three are all that are pertinent to this ques-

tion—two in response to interrogatories submitted by the plaintiffs, and the other to one submitted by the defendants:

"1st. Did the locators of the Comanche lode claim, prior to the location of said claim, discover in the shaft claimed by them as discovery shaft a vein or crevice of quartz or ore, with at least one well-defined wall on a lode or vein of rock in place bearing gold, silver or other valuable mineral deposits?

"Answer. Yes.

"2d. If your answer to the foregoing interrogatory be 'yes,' then answer: Was any part of such vein or lode discovered by the locators of said Comanche claim at the point of discovery, south of the south boundary line of the Shannon lode claim as patented and within the limits of the said Comanche lode claim as located?

"Answer. Yes.

"1st. If the jury find that the locators of the Comanche lode claim discovered a vein in the hole or shaft claimed as the Comanche discovery, then the jury will answer: Was the top or apex of such vein within the limits of the Shannon claim as patented?

"Answer. No."

We fail to see any conflict between these findings and the general verdict. They show that within the discovery shaft a vein was disclosed, and that the top or apex of such vein was not within the limits of the Shannon claim. It follows, of course, that it must have been within the Comanche claim, and that was sufficient to sustain the location. It is said that the second finding, which is to the effect that a part of such vein or lode was south of the boundary line and within the limits of the Comanche claim, carries with it the implication that part was north of that boundary and within the Shannon claim; that as the testimony shows that the general direction of the dip was southward, and only a part of the vein or lode was within the Comanche claim, the apex of this vein was necessarily within the Shannon claim. But it is

distinctly found that the top or apex was not within the limits of the Shannon claim; and because the jury responded "yes" to a question as to whether a part of this vein was within the Comanche claim, it does not follow that they would have responded "no" if the question had been whether all of the vein was within the Comanche territory. Doubtless the form of this question was adopted by counsel for plaintiffs in view of the conflict as to the boundary line; but it is not fair to infer from the mere form that the jury meant to find, or would have found, if the distinct inquiry had been presented to them, that any portion of the vein was within the Shannon territory. It would be a strained inference from the facts as found, that any portion of the vein, from its apex downward, at least so far as disclosed in the discovery shaft, was north of the boundary line within the limits of the Shannon claim. There is, therefore, no conflict between the findings and the verdict, and there was ample testimony to sustain both.

Counsel for plaintiffs in error insists that under the instructions the jury might have found for the plaintiffs, if any portion of the apex was within the Comanche territory, and in support thereof refers to this instruction:

"8. (Given.) The apex of a vein or lode is the highest point thereof, and may be at the surface of the ground or at any point below the surface. When the vein or lode does not crop out, but is what is called a blind vein or lode, the apex thereof would necessarily be below the surface of the ground; and in this case you are instructed that if the locators of the Comanche lode vein, at the time of the location thereof found, or if, from the work done by others prior thereto, they could see, at any point within the limits of said location, a lode or vein the top or apex of which was within the said lines of their location, then, in such case, they made a discovery of a lode or vein such as the law requires to be made to entitle them to locate the ground, and it is wholly immaterial as to the amount or quantity of such vein or lode which may

have been found within the limits of their said location; any amount of it would suffice, however small, either as to the amount of the vein or its apex within the limits of the said location."

While the giving of this instruction was at the trial excepted to, error has not been here assigned thereon, and with one construction, at least, of its language it is undoubtedly correct. The apex of a vein is not necessarily a point, but often a line of great length. Any portion of the apex on the course or strike of the vein found within the limits of a claim is sufficient discovery to entitle the locator to obtain title, for while the owner of a vein may follow it in its descent into another's territory beyond his own side lines, he cannot beyond his end lines, and the vein beyond those end lines is subject to further discovery and appropriation. That such was the understanding by the jury of the instruction and such the fact in this case is evident from the findings. Indeed, it would seem from some of the testimony that the course or strike of this vein was not exactly along the boundary line between the Comanche and the Shannon, but varying somewhat therefrom; hence the apex, in its full width and with some portions of its length, might be found in each claim, and so discovered justify the discoverer in obtaining title to each.

We see no error in the proceedings, and the judgment will be

Affirmed.

HENRY P. BERG v. BOSTON & MONTANA CONSOLIDATED COPPER & SILVER MINING COMPANY.

(12 Montana 212; 29 Pac. 545. Supreme Court. April 18, 1892.)

A motion for a nonsuit is practically a demurrer to the evidence.

Only where no reasonable conclusion of negligence can be drawn from the evidence should a nonsuit be allowed.

[1]**Not allowing time after misfire.** Where the foreman after waiting 10 or 12 minutes after the fuse had been fired, remarked "I guess the blast is dead" and sent the plaintiff, a laborer not familiar with or in charge of the blasting, to work within reach of the explosion which followed, there is sufficient evidence of negligence to go to the jury.

Appeal from District Court, Cascade County; CHARLES H. BENTON, Judge.

[1]City not liable for contractor's negligence in blasting. *Blumb* v. *City of Kansas*, 84 Mo. 112; 54 Am. Rep. 87.

Damages done to neighboring property by blasting constitute a wrong without regard to care or negligence on part of the party doing the blasting. *Colton* v. *Onderdonk*, 69 Cal. 155; 10 Pac. 395; 58 Am. Rep. 556. *Wright* v. *Compton*, 2 M. R. 189.

The degree of care necessary to give warning considered. *Beauchamp* v. *Saginaw M. Co.* 50 Mich. 163.

No liability without negligence. *French* v. *Vix*, 143 N. Y. 90; 37 N. E. 612.

Plaintiff injured from fooling with giant cap cannot recover. *Ray* v. *Jeffries*, 86 Ky. 367; 5 S. W. 867.

It is not negligence *per se* to throw rock across boundaries. *Klepsch* v. *Donald*, 4 Wash. 436; 30 Pac. 991.

Requisites of complaint for dynamite explosion. *Laflin Co.* v. *Tearney*, 131 Ill. 322; 23 N. E. 389.

Question of liability between owners and contractors. Blasting within town limits. *James* v. *McMinimy*, 93 Ky. 471; 20 S. W. 435.

Degree of care required of Mining Company handling high explosives. Explosion of dynamite from vibrations of engine. *Mather* v. *Rillston*, 156 U. S. 391; 18 M. R.—

Failure to give notice of blasting is negligence. *Wadsworth* v. *Marshall*, 88 Me. 263; 34 Atl. 30.

Mine owner not bound to inspect explosives. *Shea* v. *Wellington*, 163 Mass. 364; 40 N. E. 173. But cannot introduce new and stronger powder without informing as to increased danger. *Smith* v. *Oxford Co.*, 2 M. R. 208. *Chambers* v. *Chester*, (Mo.) 72 S. W. 904.

Form of complaint for injuries to the next adjoining lot and its occupants. *Kutzer* v. *Saratoga Springs*, 40 N. Y. Sup. 474.

Action by Henry P. Berg against the Boston & Montana Consolidated Copper & Silver Mining Company. Judgment for defendant. Plaintiff appeals. Reversed.

BAUM & BISHOP, for appellant.

COOPER & PIGOTT, for respondent.

DEWITT, J. This action is for damages for personal injuries received by plaintiff when in the employ of defendant, alleged to have occurred through defendant's negligence. Defendant was engaged in taking rock from a quarry. It was necessary to blast the rock. Plaintiff was a common laborer, working at handling the rock and *debris* thrown down by the blasting. He was not engaged in the blasting department of the labor. The court granted defendant's motion for a nonsuit. Plaintiff appeals.

The question before this court is not as to the weight of the testimony, but simply whether it was sufficient to go to the jury. A motion for a nonsuit is practically a demurrer to the evidence. It admits the truth of plaintiff's testimony. The rule as to submitting a question of negligence to the jury is, as we understand it, that, if the question of negligence is a fairly disputed question of fact, it must be resolved by the jury; but that, if the evidence is perfectly clear to the effect that there was no negligence, the matter is for the court. If the district court was correct in granting the nonsuit, it must be that the only reasonable conclusion from the evidence was that there was no negligence by defendant. In this case there is certainly evidence that one Robert Baldwin was the foreman under whom plaintiff was working. Plaintiff testified to this. Defendant may have been able to successfully contradict this testimony, but it did not do so. It cannot, therefore, be said that it so clearly appeared that Baldwin was not the foreman as to warrant the court in so holding. So much for that important fact in the case.

On the afternoon of the accident, defendant, by its workmen, put a charge of three kegs of powder into the rock. The fuse was fired, an alarm was duly given, and plaintiff, with the foreman, Baldwin, and the rest of the crew, sought safety in a carpenter shop at a distance. Plaintiff did not know the amount of the charge, the length of the fuse, or the time required for the fire to reach and explode the blast, nor is he charged with the duty to know any of these matters. He was working in a department other than that of blasting. After remaining in the carpenter shop for from 10 to 12 minutes, and the blast having not yet exploded, the foreman said: "I guess that the blast is dead. We might as well turn out, and go to work." The plaintiff heard this remark. This is substantially the testimony. At least—and this is sufficient in the matter of a nonsuit—there is evidence that these were the facts. The foreman started to go back to the work, and towards the blast. Plaintiff did not follow at once, but turned and took a drink of water, and then followed the foreman. The plaintiff and the foreman were near each other, and not far from the blast when it exploded, injuring them both. These are facts as to which there was evidence. Is it clear that there was no negligence by defendant—so clear that it was the duty of the court to determine the matter at once without the aid of the jury? It is not necessary to decide whether the words of the foreman were an order to plaintiff to return to work.

We are of opinion that the decision in *Kelley* v. *Cable Co.* 7 Mont. 70, 14 Pac. Rep. 633, is decisive of the motion for a nonsuit in this case. In that case the plaintiff, Kelley, was a laborer in the mine of defendant. It was his duty to go on shift at night, and work at removing material thrown down by the miners during the day. On the night of the accident he went to work as usual, and in performing his labor an explosion took place; it not being clear whether from a missed charge or a piece of powder having been accidentally dropped

among the *debris* in which plaintiff was working. The opinion of the court, among other things, said: "It is well settled that this foreman, having the authority to employ and discharge the plaintiff—in fact, having actually employed him and set him to work on many previous occasions, and on this very night—under such circumstances the negligence of the foreman would be the negligence of the defendant corporation. This is really admitted to be the law and the fact by the counsel for respondent. *Spelman* v. *Iron Co.* 56 Barb. 155. The *prima facie* presumption is that the defendant has discharged its duty to plaintiff in this case. Hence this presumption must be overcome by proof of fault on the part of defendant, by showing either that the foreman knew, or ought to have known, that the danger to which the plaintiff was exposed was extraordinary; that is, that there was a charge of blasting powder in the mine, where he was sent to work, which had not been fired. Wood, Mast. & S. § 368. If the danger is such that the master, by the use of reasonable and ordinary care, as it is defined in *Diamond* v. *N. P. Ry.* 6 Mont. 580; 13 Pac. 367, heretofore quoted, might have known of it, his liability is the same as if he had known it actually. Wood, Mast. & S. §§ 345, 348, 398, and cases cited. And in regard to the ascertainment of the condition of this blast the plaintiff had a right to presume that the defendant had done its duty, and to act on that presumption in going to work in the crosscut, where the blasts had been fired, as he was ordered. Wood, Mast & S. § 356; *Gibson* v. *Pacific R. R. Co.* 46 Mo. 170; 2 Am. Rep. 497; and cases cited; *Wonder* v. *Baltimore R. R. Co.* 32 Md. 411; 3 Am. Rep. 143; *Railroad Co.* v. *Gildersleeve*, 33 Mich. 135. If the defendant or its foreman knew, or by the use of reasonable diligence might have known, of the existence of the danger from this unexploded blast, it was his bounden duty to convey such information to the plaintiff. *Baxter* v. *Roberts*, 44 Cal. 190–193; 13 Am. Rep. 160; *Spelman* v. *Iron Co.* 56 Barb. 165."

So in the case at bar it would have required but little diligence on the part of the foreman to have known of the danger from this unexploded blast. It is in evidence that the fuse used would burn a foot a minute. The foreman could have readily known the length of the fuse beyond the powder, and very near how much time was required to explode the blast or make it certain that the blast was dead. He could have kept time after the fuse was fired. Three kegs of powder in rock are a dangerous agent. As above observed, these facts are all, as the case now stands on motion for a nonsuit, admitted. It cannot be held that it so clearly appears that defendant was free from negligence that the court was justified in taking the matter from the jury, and deciding the case as an undisputed question of fact.

It is ordered that the judgment be reversed, and that the case be remanded for a new trial.

BLAKE, C. J., and HARWOOD, J., concur.

JAMES W. KENDALL ET AL. v. THE SAN JUAN SILVER MINING CO.

(144 U. S. 658; 12 Sup. Ct. Rep. 779. Supreme Court. April 25, 1892.)

[1]**Status of claim when reservation opened.** Location of a mining claim upon the Ute Reservation was inoperative under the terms of the treaty. When the locators failed to file a relocation under the State Laws of Colorado within three months after the Reservation was thrown open they cannot hold against intervening locators making their location after the Reservation became public domain.

Allowing statutory time to record. Mining locators within a reservation treated as discoverers having the statutory period to stake and record from date of opening to the public, treating that date as date of discovery.

In error to the Supreme Court of the State of Colorado.

Action by James W. Kendall, Annie G. Shackelford, Ruah E. Dickinson, Caroline V. Dickinson, J. C. Dickinson, Ellah Dickinson, and John W. Jacque against The San Juan Silver Mining Company, to determine the right of possession to a mining claim. Judgment for defendant, which was affirmed by the State Supreme Court. Plaintiffs bring error. Affirmed.

E. T. WELLS and R. T. MCNEAL, for plaintiffs in error.

[1]A court will protect a right to mine by license from the Indian Nation. *Oolagah Co.* v. *McCaleb*, 68 Fed. 86.

No proclamation needed after reservation opened. *McFadden* v. *Mountain View Co.* 87 Fed. 154.

Location of scrip on, void. *U. S.* v. *Carpenter*, 111 U. S. 347.

A mining claim cannot be located upon, and the parties cannot waive the point and agree to try their title as if there had been no reservation. *French* v. *Lancaster*, 2 Dak. 346; 47 N. W. 395.

Act forbidding mining leases in Indian Territory held not to operate on prior leases. *Atoka Co.* v. *Adams*, 104 Fed. 471.

Prospector in Indian Territory allowed one mile of coal. *McCurtain* v. *Grady*, 1 Ind. Ter. 107; 38 S. W. 65.

A. T. BRITTON and A. B. BROWNE, for defendant in error.

Mr. Justice FIELD delivered the opinion of the court.

The defendant, a corporation organized and existing under the laws of Colorado, in October, 1880, applied to the proper land office in that state for a mineral patent for a lode claim known as the "Titusville Lode," in San Juan County, which was 1,500 feet in length by 300 feet in width. Within the time prescribed by statute, and during the month, the appellants here, Kendall and others, filed in the same land office an adverse claim for a portion of the premises of which the defendant desired to obtain a patent, asserting a prior and superior right to the same, as part of a lode known as "Bear Lode," which they had discovered on the 3d of September, 1872, and upon which they had sunk a discovery shaft, and performed the several acts required to perfect a mineral location under the laws of the United States and the local rules and customs of miners. Within 30 days thereafter they brought the present action under section 2326 of the Revised Statutes, to determine, as between the parties, the right of possession to the disputed premises, the issue of a patent for the same being dependent upon such determination. In their complaint they allege the performance of the labor required, and all other acts necessary to preserve the lode from forfeiture. That lode, as originally located, extended 1,500 feet in length and 100 feet on each side of the center of the vein. In October, 1878, the locators filed an additional certificate of location in the local land office, claiming 150 feet on each side of the center. And they aver that the Titusville lode, claimed by the defendant corporation, is a junior location, and includes in length 1,200 feet of the surface ground of the Bear lode, and in width covers more than the south half of the surface ground for the 1,200 feet.

The defendant, in its answer, denies that the ground in

controversy comprised part of the unappropriated public domain of the United States, and that it was open to location on the 3d day of September, 1872, as set forth by the plaintiffs, and alleges that at that date the ground embraced a portion of a certain tract of land which, by treaty between the United States and certain confederated bands of the Ute Indians in Colorado, concluded March 2, 1868, and proclaimed on the 6th of November of the same year, had been reserved for the use and occupancy of the Indians, and that the Indian title to the tract was not extinguished until March, 1874. 15 St. p. 619. The answer also alleges that the Titusville lode claim was located on the 29th day of August, 1874; that all acts were done necessary to constitute a valid location of the premises; and that the legal title to the lode, and the right to its possession, had, by various conveyances from the original locators, become vested in the defendant; and it prays judgment therefor.

By the terms of the treaty mentioned, a tract of country, which included the mining property in question, was set apart for the absolute and undisturbed use and occupation of the Indians therein named, and for such other friendly tribes or individual Indians as, from time to time, they might be willing, with the consent of the United States, to admit among them; and the United States agreed that no persons except those designated, and such officers, agents, and employes of the government as might be authorized to enter upon Indian reservations in discharge of duties enjoined by law, should ever be permitted to "pass over, settle upon, or reside in the territory described," except as therein otherwise provided. 15 St. pp. 619, 620. The effect of the treaty was to exclude all intrusion for mining or other private pursuits upon the territory thus reserved for the Indians. It prohibited any entry of the kind upon the premises, and no interest could be claimed or enforced in disregard of this provision. Not until the withdrawal of the land from this reservation of the treaty by a

new convention with the Indians, and one which would throw the lands open, could a mining location thereon be initiated by the plaintiffs. The location of the Bear lode, having been made while the treaty was in force, was inoperative to confer any rights upon the plaintiffs. Whatever rights to mining land they subsequently possessed upon the original Indian tract were founded upon a new location, made more than two years after the withdrawal of the reservation, and after the Titusville lode had been located by the defendant. Had the plaintiffs, immediately after the withdrawal of the reservation, relocated their Bear lode, their position would have been that of original locators. They would then have been within the rule in *Noonan* v. *Mining Co.* 121 U. S. 393; 7 Sup. Ct. 911. That rule was this: That, where a party was in possession of a mining claim on the withdrawal of a reservation caused by a treaty with the Indians, with the requisite discovery, with surface boundaries sufficiently marked, with a notice of location posted, and with a disclosed vein of ore, he could, by adopting what had been done, and causing a proper record to be made, and performing the amount of labor or making the improvements necessary to hold the claim, date his rights from that day. But such was not the case here. The reservation by the treaty was withdrawn in March, 1874; the Titusville lode was located on the 29th day of August, 1874; and the Bear lode of the plaintiffs was not relocated until two years afterwards.

Whatever rights, therefore, the plaintiffs had, subsequently to the withdrawal of the reservation, in the premises claimed by the defendant, arose from its disclaimer. By that disclaimer the company relinquished to the plaintiffs such portion of their Bear lode, with surface width of 50 feet, as came in conflict with the premises claimed by it under the Titusville location; and upon its motion in the trial court, judgment was entered, pursuant to such disclaimer, for the plaintiffs, for the amount disclaimed and for the defendant for the residue.

The plaintiffs now seek, by their writ of error, to recover the residue of the Titusville lode, insisting that under the decision in *Noonan* v. *Mining Co.* they have a right to all the premises which were covered by their illegal location during the pendency of the Indian treaty. But such is not the proper construction of that decision. There was in that case no new location by different parties, after the removal of the reservation, to interfere with the old location, then renewed, and with a proper record.

There is another view of this case, which leads to the same conclusion. Section 2324 of the Revised Statutes makes the manner of locating mining claims and recording them subject to the laws of the state or territory, and the regulations of each mining district, when they are not in conflict with the laws of the United States. The act of Colorado of February 13, 1874, requires the discoverer of a lode, within three months from the date of discovery, to record his claim in the office of the recorder of the county in which the lode is situated by a location certificate.

It also provides that a location certificate of a lode claim which shall not contain the name of the lode, the name of the locator, the date of the location, the number of linear feet claimed on each side of the discovery shaft, the general course of the lode, and such description as shall identify the claim with reasonable certainty, shall be void.

The reservation of the premises in controversy by force of the Indian treaty was extinguished April 29, 1874. On that date the premises in controversy were open to location, and within three months afterwards the duty rested upon the plaintiffs to record the certificate of the location of their lode if they desired to preserve any right in it. No such record of their location was made within that time. No record was made or desired by them until an additional certificate of location was filed by them, claiming 150 feet on each side of the center of their vein, which was not done until October, 1878.

As they failed to comply with the law in making a record of the location certificate of their lode, it does not lie with them to insist that their wrongful entry upon the premises during the existence of the Indian reservation operated in their favor against parties who went upon the premises after they had become a part of the public domain, and made a proper location certificate and record thereof, and complied in other particulars with the requirements of the law.

Judgment affirmed.

THE PEOPLES GAS CO. ET AL. v. ELBERT TYNER.

(131 Indiana 277; 31 N. E. 59. Supreme Court. April 27, 1892.)

[1]**Right to shoot the well.** A person who has a natural gas well on his premises has the right to explode nitroglycerine therein for the purpose of increasing the flow, although such explosion may have the effect to draw gas from the land of another.

[2]**But if the well be situate in a city** where the explosion would endanger the lives and property of strangers the owner must be content with the natural flow and may be enjoined from shooting.

Point of crime involved. The application for such an injunction cannot be defeated, because the accumulation of nitroglycerine within the corporate limits of a town or city is a crime. A private citizen may maintain an action for a public wrong, if he suffers an injury peculiar to himself, and not sustained by the general public.

The sufficiency of a complaint is not involved where a mere temporary injunction is asked, but the court will grant relief where it appears that the case is a proper one for investigation.

Appeal from Circuit Court, Hancock County.

Suit by Elbert Tyner for an injunction against the People's Gas Company and others. From a judgment granting the relief defendants appeal. Affirmed.

JAMES A. NEW, CHARLES DOWNING and ASA M. NEW, for appellants.

DAVID S. GOODING, for appellee.

COFFEY, J. This was an action by the appellee against the appellants in the Hancock Circuit Court for the purpose of obtaining an injunction.

The complaint alleges, substantially, that the appellee

[1]The owner has the right to use artificial means to get the oil to surface though he may in so doing drain oil from beyond his territory. *Jones v. Forest Co.* 194 Pa. 379; 44 Atl. 1074.

[2]The real danger complained of apparently was not from the actual shooting of the well but from the accumulation of a large quantity of nitroglycerine in a populated place where it might accidentally explode.

and his wife are the owners by entireties of the real estate therein described, which consists of four city lots in the city of Greenfield; that the lots are inclosed together by a fence, and that his dwelling-house and residence, in which he and his family reside, is situated on the lots; that the lots are near the center of the city, and, with his residence thereon, are of the value of $4,000; that with full knowledge of all the facts the appellants, regardless of the rights of the appellee, and of the safety, peace, comfort, and lives of himself and family, have, without his consent and over his objections, within the last 40 days, dug and constructed a natural gas well to the depth of about 1,000 feet, and about 200 feet distant from the appellee's residence, with only a street 40 feet in width between the appellee's lots and the lot on which the well is sunk; that the appellants are about to "shoot" said well, and will do so unless restrained; that for the purpose of "shooting" the well the appellants, about midnight of the —— day of August, 1889, unlawfully procured to be brought and unlawfully permitted a large quantity of nitroglycerine or other nitro-explosive compound to be and remain upon Sycamore street, a public street in the city, and within less than 200 feet of appellee's residence, for about three hours, in the midst of and surrounded by a large number of people; that appellants, by their employes, threatened and attempted to "shoot" said gas well, and that they still threaten so to do, with their said nitroglycerine or other nitro explosive compound, and will do so unless restrained; that nitroglycerine is highly explosive, and very dangerous to property and life, and is liable to explode under any and all circumstances, and at any time or place, and that an explosion of 60 or 100 quarts of said explosive at any given place on the surface of the earth could and probably would destroy life and property for a distance of 500 yards in all directions from such explosion; that the handling or storing thereof in or about appellants' gas well will endanger the lives of his family, as well as the safety of his property,

and that the shooting of said well with nitroglycerine will greatly injure and damage the appellee's said property, both above and under the surface of the earth, and endanger his life and the lives of his family. This complaint was verified, and upon it and the affidavits filed in support of its allegations the court granted a temporary injunction, from which this appeal is prosecuted. The affidavits filed by the appellee tended to prove that the appellants' gas well is within the corporate limits of the city of Greenfield; that a short time prior to the filing of the complaint in this cause the appellants deposited in or near the derrick at the well described in the complaint about 117 quarts of nitroglycerine, weighing about 340 pounds, with the intention of exploding the same in the well. The affidavits further tend to show that nitroglycerine is very explosive, and that it is liable to explode at any time; that the explosion of that quantity of nitroglycerine upon the surface of the earth would be likely to destroy life and property at any point within 500 yards of such explosion.

It is contended by the appellants:

First, That they had the right to use their own property as to them seemed best, and for that reason they could not be enjoined from exploding nitroglycerine in their well for the purpose of increasing the flow of natural gas, though such explosion might have the effect to draw the gas from the land of the appellee;

Second, That, as bringing nitroglycerine into the corporate limits of a town or city in a greater quantity than 100 pounds is made a crime by statute, it cannot be enjoined.

On the other hand, it is contended by the appellee:

First, That natural gas is property, and that the appellants have no legal right to do anything upon their own land which will draw such gas from his land, and appropriate it to their own use;

Second, That, as he is liable to suffer an injury peculiar to himself, to which the public in general is not subject, by

the unlawful act of the appellants in bringing nitroglycerine within the corporate limits of Greenfield, he is entitled for that reason to an injunction.

It has been settled in this state that natural gas, when brought to the surface of the earth and placed in pipes for transportation, is property, and may be the subject of interstate commerce. *State* v. *Indiana & Ohio Oil, Gas & Min. Co.* 120 Ind. 575; 22 N. E. Rep. 778.

Water, petroleum, oil and gas are generally classed by themselves as minerals possessing in some degree a kindred nature. As to whether the owner of the soil may dig down and divert a well-defined subterranean stream of water, there is much diversity of opinion and conflict in the adjudicated cases; but the authorities agree that the owner of a particular tract of land may sink a well, and appropriate to his own use all the percolating water found therein, though it may entirely destroy the well on his neighbor's land. Ang. Water-Courses, § 112; *Hanson* v. *McCue*, 42 Cal. 303; *Wheatley* v. *Baugh*, 25 Pa. St. 528; *Frazier* v. *Brown*, 12 Ohio St. 294; *Acton* v. *Blundell*, 12 Mees & W. 324; *Delhi* v. *Youmans*, 50 Barb. 316; *Mosier* v. *Caldwell*, 7 Nev. 363; *Railroad Co.* v. *Peterson*, 14 Ind. 112; *City of Greencastle* v. *Hazelett*, 23 Ind. 186.

It is a familiar maxim that in contemplation of law, land always extends downward as well as upwards, so that whatever is in a direct line between the surface of any land and the center of the earth belongs to the owner of the surface. Mr Angell says that it would seem to follow from this maxim that whether what is subterreanan be solid rock, mines, or porous soil, or salt springs, or part land and part water, the person who owns the surface may dig therein, and apply all that is there found to his own purposes *ad libitum*. Section 109, Ang. Water-Courses.

Upon this principle, it was held by this court in the case of *Railroad Co.* v. *Peterson*, *supra*, that if an adjoining land owner, in lawfully digging upon his own land, draws the water

from the land of another, to his injury, such injury falls within the description of *damnum absque injuria*, which cannot become the ground of an action.

In the case of *Haldeman* v. *Bruckhart*, 45 Pa. St. 514, it was said:

"The purchaser of lands on which there are unknown subsurface currents must buy in ignorance of any obstacle to the full enjoyment of his purchase indefinitely downwards, and the purchaser of lands on which a spring rises, ignorant whence and how the water comes, cannot bargain for any right to a secret flow of water in another's land."

Mr. Gould, in his work on Waters, (2d Ed. § 291), says: "Petroleum oil, like subterranean water, is included in the comprehensive idea which the law attaches to the word 'land,' and is a part of the soil in which it is found. Like water, it is not the subject of property, except while in actual occupancy, and a grant of either water or oil is not a grant of the soil, or of anything for which ejectment will lie."

In recognition of the principle here announced in the case of *Brown* v. *Vandergrift*, 80 Pa. St. 142, it was said by the court that "the discovery of petroleum led to new forms of leasing lands. Its fugitive and wandering existence within the limits of a particular tract was uncertain, and assumed certainty only by actual development founded upon experiment."

What is said of the fugitive character of percolating water and of petroleum oil applies with greater force to natural gas.

In the case of *Gas Co.* v. *De Witt*, 130 Pa. St. 235; 18 Atl. Rep. 724, it was said: "Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferœ naturæ*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain.' * * * They belong to the

owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining or even a distant owner drills his own land and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his."

It is not denied by the appellee in this case that the appellants have the perfect legal right to sink a well into their own land, and draw therefrom all the gas that may naturally flow to it, but he contends that they have no right to explode nitroglycerine in the well to increase the natural flow.

When it is once conceded that the owner of the surface has the right to sink a well and draw gas from the lands of an adjoining owner, no valid reason can be given why he may not enlarge his well by the explosion of nitroglycerine therein for the purpose of increasing the flow. The question is not as to the quantity of gas he may take, but it is a question of his right to take the gas at all.

So far as this suit seeks to enjoin the appellants from exploding nitroglycerine in their gas well, upon the ground that it will increase the flow of the gas to the injury of the appellee, it cannot, in our opinion, be sustained.

The rule that the owner has the right to do as he pleases with or upon his own property is subject to many limitations and restrictions, one of which is that he must have due regard for the rights of others. It is settled that the owners of a lot may not erect and maintain a nuisance thereon, whereby his neighbors are injured. If he does so, and the injury sustained by such neighbors cannot be adequately compensated in damages, he may be enjoined. *Owen* v. *Phillips*, 73 Ind. 284.

If the appellants in this case have been guilty of the folly of sinking a gas well in the center of a thickly-populated city,

where they cannot collect the necessary quantity of nitroglycerine to shoot it without endangering the property and lives of those who have no connection with their operations, they should be content with such flow of gas as can be obtained without such shooting. It certainly cannot be maintained that the destruction of human life is an injury which can be compensated in damages. No authority has been cited, and we know of none, supporting the position of the appellants that the appellee is not entitled to an injunction because the accumulation of nitroglycerine within the corporate limits of a town or city is a crime. It has long been settled that a private citizen may maintain an action for a public wrong if he suffers an injury peculiar to himself, and not sustained by the public in general. 3 Bl. Comm. p. 209; *Powell* v. *Bunger*, 91 Ind. 64; *Ross* v. *Thompson*, 78 Ind. 90; *Cummins* v. *City of Seymour*, 79 Ind. 491; *McCowan* v. *Whitesides*, 31 Ind. 235; *Fossion* v. *Landry*, 123 Ind. 136; 24 N. E. Rep. 96; *Bank* v. *Sarls*, 129 Ind. 201; 28 N. E. Rep. 434; and *Adams* v. *Car Co.* 131 Ind. 375; 31 N. E. Rep. 57.

The sufficiency of the complaint, as it would be when tested by demurrer, is not involved here.

This is a mere temporary injunction. To authorize the court to grant such relief, it was not necessary that a case should be made that would entitle the appellee to relief at all events at the hearing. In such cases, it is sufficient if the court finds upon the pleadings and evidence a case which makes the transaction a proper subject for investigation in a court of equity. *Spicer* v. *Hoop*, 51 Ind. 365.

In our opinion the court did not err in granting the temporary injunction in this case.

Judgment affirmed.

BENSON MINING & SMELTING CO. v. ALTA MINING & SMELTING CO.

(145 U. S. 428; 12 Sup. Ct. Rep. 877. Supreme Court. May 16, 1892.)

Interest added to make jurisdictional amount. When the judgment in the Supreme Court of a Territory exceeds $5,000, this court has jurisdiction of an appeal, although the judgment in the trial court may have been for a less sum and the jurisdictional amount is reached in the appellate court by adding interest to that judgment.

No annual labor after entry. When the price of a mining claim has been paid to the government, the equitable rights of the purchaser are complete, and there is no obligation on his part to do further annual work in order to obtain a patent.

The right to a patent once vested is treated by the government as a patent issued and when issued it relates back.

[1]**Where the trespass is knowing and wilful** there should be no deductions for cost of mining; but the cost of sorting and transporting the severed ore was deducted and interest allowed on the difference.

Appeal from the Supreme Court of the Territory of Arizona. Affirmed.

[1]*Sunnyside Co.* v. *Reitz*, 14 Ind. App. 478; 39 N. E. 541.

Where the mineral was taken under color of title or claim of right, only its value in place should be allowed. *Dougherty* v. *Chestnutt*, 2 Pickle 1; 5 S. W. 444. *Dyke* v. *Nat. Gas Co.* 49 N. Y. Sup. 180.

Where the ore is taken under claim of right costs of mining are to be deducted. *St. Clair* v. *Cash Co.* 9 Colo. App. 235; 47 Pac. 466. *Durant Co.* v. *Percy Co.* 93 Fed. 166.

The question of bona fides in such cases is for the jury. *St. Clair* v. *Cash Co. Supra.*

Inadvertent trespasser held to pay value at pit's mouth. *Donavan* v. *Cons. Coal Co.* 187 Ill. 58 N. E. 290.

Where parties take out ore as mortgagees in possession or equitable owners they are entitled to all expenses of working and compensation for improvements. *Wasatch Co.* v. *Jennings*, 14 Utah 221; 46 Pac. 1106.

In inadvertent trespass it is the value of the thing removed as part of the realty and not as a chattel. *Warrior Co.* v. *Mabel Co.* 112 Ala. 624; 20 So. 918.

Only compensatory damages where gas was taken in good faith. *Gerkins* v. *Kentucky Co.* 23 Ky. L. R. 2415; 67 S. W. 821.

On July 25, 1884, appellee, plaintiff below, commenced its action in the District Court of the First Judicial District of the Territory of Arizona to recover of defendant the sum of $25,000 for 210 tons of silver-bearing ore, mined and removed from the Alta mine, situated in the Harshaw mining district, in Pima County, Ariz. A jury having been waived, the case was tried before the court, and a judgment was entered for the plaintiff on March 22, 1886, for the sum of $4,590.06, with interest from that time until paid at the rate of 10 per cent. per annum. Defendant took the case to the Supreme Court of the territory, which, on February 17, 1888, affirmed the judgment. From such judgment of affirmance defendant appealed to this court.

NATHANIEL WILSON, for appellant.

J. A. ANDERSON and T. M. NORWOOD, for appellee.

Mr. Justice BREWER delivered the opinion of the court.

The amount due, as determined by the judgment of the Supreme Court of the territory, was over $5,000, being the sum of $4,590.06, as awarded by the judgment of the District Court, with interest from its date, March 22, 1886, at 10 per cent. per annum, to February 17, 1888, the date of the judgment of affirmance. This court, therefore, has jurisdiction of the appeal. *Zeckendorf* v. *Johnson*, 123 U. S. 617; 8 Sup. Ct. 261.

On the merits of the case two questions are presented. It appears that in 1879 Fagan, Harshaw and others were the owners of the Alta mine, and at that time made application to the proper land office for a United States patent thereto, paid the price required by law, and obtained the

Test as to trespass, whether willful or innocent depends on the intent; following advice of counsel shows good faith. *U. S.* v. *Homestake Co.* 117 Fed. 481.

ordinary certificate of purchase. Thereafter they sold and conveyed the property to the plaintiff. The plaintiff continued to do a large amount of work on the mine up to the year 1882, but, having failed in that year to do as much as $100 worth of work thereon, one J. K. Luttrell relocated it about June 1, 1883, and called it the "Ben Butler Mining Claim," and under this relocation and possession taken in consequence thereof the ore in controversy was mined and removed. On January 10, 1884, the patent was issued to the original locators, Fagan, Harshaw, and others. Upon these facts appellant claims that, although the mine was fully paid for by the locators in 1879, and a certificate of purchase received, inasmuch as the patent did not issue until January 10, 1884, and because the plaintiff failed to do $100 worth of work in the year 1882, its rights ceased, and the relocation by Luttrell was valid, and vested in him the property. This claim is based upon section 2324, Rev. St., which provides, among other matters:

"On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year; * * * and upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made; provided, that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

This language, standing by itself, apparently sustains the contention of the appellant; but a consideration of the provisions of all the statutes respecting mining claims makes it obvious that such is not the true construction. The precise question has never been presented to this court, but the import of several decisions is against appellant's contention.

The uniform ruling of the land department has been against it, the question having been presented at an early day, and fully examined. In the case of the *American Hill Quartz Mine*, reported in Sickels' Mining Laws & Decisions, pages 377 and 385, and also in Copp's U. S. Mineral Lands, page 254, are well-considered opinions by the commissioner of the general land office and the secretary of the interior, each holding that, when the price of a mining claim has been paid the equitable rights of the purchaser are complete, and there is no obligation on his part to do further annual work, the delay in issuing the patent being a mere matter occurring in the administration of the land department, and the patent, when issued, by relation taking effect as of the date of the purchase. In the consideration of this question the secretary of the interior opens with these pertinent suggestions: "At the outset it is proper to remark that by the mining laws of the United States three distinct classes of titles are created, viz.: (1) Title in fee simple; (2) title by possession; (3) the complete equitable title. The first vests in the grantee of the government an indefeasible title, while the second vests a title in the nature of an easement only. The first, being an absolute grant by purchase and patent without condition, is not defeasible, while the second, being a mere right of possession and enjoyment of profits without purchase and upon condition, may be defeated at any time by the failure of the party in possession to comply with the condition, viz., to perform the labor or make the annual improvements required by the statute. The equitable title accrues immediately upon purchase, for the entry entitles the purchaser to a patent, and the right to a patent, once vested, is equivalent to a patent issued."

Obviously section 2324 does not provide for the acquisition of title to the land. Its scope and purport are expressed in the opening words, as follows: "The miners of each mining district may make regulations not in conflict with the

laws of the United States or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements;" and then follow several provisions in the nature of limitations on the general authority thus given to miners. Among them is that quoted. That evidently does not refer to the "location," or "manner of recording," but to the "amount of work necessary to hold possession of a mining claim,"—that is, to continue the mere possessory title. As Congress, by section 2319, Rev. St., had enacted that "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase by citizens of the United States," etc., it is not strange that it gave the sanction of law to the regulations which the miners in any locality might establish for their several occupation and working of mining claims; but it is not to be expected that it would also give to them authority to determine how the title to the land itself might be acquired. And so we find that section 2325 provides that "a patent for any land claimed and located for valuable deposits may be obtained in the following manner," and gives thereafter the various steps necessary to be taken to purchase the land. Near its close is this, as to the patent: "If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists." In other words, when the price is paid the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business in the land department causes delay. But such delay, in the mere administration of affairs, does not diminish the rights flowing from the purchase, or cast

any additional burdens on the purchaser, or expose him to the assaults of third parties.

The opinion of the secretary of the interior has received judicial indorsement in the cases of *Aurora Hill Con. M. Co.* v. 85 *M. Co.* in the Circuit Court of the United States for the district of Nevada, (34 Fed. 515,) and *Deno* v. *Griffin*, 20 Nev. 249; 20 Pac. 308. It is a general rule, in respect to the sales of real estate, that when a purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser. And this general rule of real-estate law, has been repeatedly applied by this court to the administration of the affairs of the land department of the government; and the ruling has been uniform that whenever, in cash sales, the price has been paid, or, in other cases, all the conditions of entry performed, the full equitable title has passed, and only the naked legal title remains in the government, in trust for the other party, in whom are vested all the rights and obligations of ownership. Thus, in the case of *Carroll* v. *Safford*, 3 How. 441, it was held that, after the price of the land had been paid, and the purchaser held the receiver's certificate therefor, it was subject to state taxation, although the patent was not then issued. In the opinion, page 461, the court said that "lands which have been sold by the United States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are considered, they are protected under the patent certificate as fully as under the patent. * * * The government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser." In *Lessee of French* v. *Spencer*, 21 How. 228, it appeared that a military land warrant had been located on the tract, and the land sold thereafter but before the issue of the patent; the act under which the land warrants were granted providing that no claim for

military bounties should be assignable or transferable until after the patent had been issued, and that all sales, mortgages, or contracts made prior thereto should be void. In that respect it will be seen that the langugae is not dissimilar to that used in the section before us in the present case. It was held that the patent related back to the time of the location, and that the conveyance intermediate the location and the patent was valid, and transferred the title. In *Witherspoon* v. *Duncan*, 4 Wall. 210, there was a donation entry instead of a cash purchase; but, the entry having been completed, it was held that the title passed, and that the land was subject to taxation, although the patent did not issue until years thereafter. In *Stark* v. *Starrs*, 6 Wall. 402, 418, this court observed that "the right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When in fact the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants." In *Wirth* v. *Branson*, 98 U. S. 118, it was held that "a party who has complied with all the terms and conditions which entitle him to a patent for a particular tract of public land, acquires a vested interest therein, and is to be regarded as the equitable owner thereof." And in *Deffeback* v. *Hawke*, 115 U. S. 392; 6 Sup. Ct. Rep. 95, the court gave to a certificate of purchase of mineral lands the same effect that had been theretofore given to cash and donation entries of agricultural lands. In the opinion, on page 405, is found this language: "No adverse claim was ever filed with the register and receiver of the local land office, and the entry was never canceled nor disapproved by the officers of the land department at Washington. The right of the government, therefore, passed to him; and though its deed, that is, its patent, was not issued to him until January 31, 1882, the certificate of purchase, which was given to him upon the entry, was, so far

as the acquisition of title by any other party was concerned, equivalent to a patent. It was not until the 28th of July following that the probate judge entered the town site. The land had then ceased to be the subject of sale by the government. It was no longer its property. It held the legal title only in trust for the holder of the certificate. *Witherspoon* v. *Duncan*, 4 Wall, 210, 218. When the patent was subsequently issued, it related back to the inception of the right of the patentee."

There is no conflict in the rulings of this court upon the question. With one voice they affirm that when the right to a patent exists the full equitable title has passed to the purchaser, with all the benefits, immunities, and burdens of ownership, and that no third party can acquire from the government interests as against him. The decision of the trial court was correct. The attempted relocation by Luttrell was void, and gave him no rights of possession or otherwise.

The only other question is as to the measure of damages. The trial court found that the value of the ores at the time of their conversion by the defenant was $11,716.65; that after the ores had been mined and become chattels, there had been expended by the defendant and others, in removing the ores from the mine, in assorting the same from the worthless rock, and in transferring the same to the smelter, the sum of $7,985.83; and gave judgment for the difference, to-wit, $3,730.82, and interest. It also found that the entries and trespasses upon the Alta mine were with knowledge of plaintiff's ownership thereof, and that the defendant, at the time it received the ores, had knowledge that they came from the Alta mine, and were the property of the plaintiff; and there was testimony to support these findings. *Walnut* v. *Wade*, 103 U. S. 683, 688; *Jessup* v. *U. S.* 106 U. S. 147, 150; 1 Sup. Ct. 74.

The contention of the appellant is that there was error

in not crediting it also with the cost of mining the ores; but as it received and converted them with knowledge that they belonged to the plaintiff, the ruling of the trial court was, within the decision in *Wooden-Ware Co.* v. *U. S.* 106 U. S. 432; 1 Sup. Ct, 398, as liberal to the appellant as it had a right to expect.

The judgment is affirmed.

[1]A. W. STINCHFIELD v. JAMES N. GILLIS ET AL.

(96 California 33; 30 Pac. 839. Supreme Court. Aug. 25, 1892.)

The ownership of intersecting veins is determined as between locators by priority of title.

[2]**The grantor of a claim cannot by later location** of the ground obtain a title which he can assert against his grantee.

[3]**Deed gives apex rights.** A deed of mining ground conveys whatever rights its locator would be entitled to if he obtained patent from the United States, including the right to follow the vein on its dip into adjoining ground.

No reserve of cross-vein. A deed of mining ground conveys all veins apexing within such ground and the grantor cannot follow a vein from outside ground into the ground conveyed claiming the same as a cross vein.

Department 1. Appeal from Superior Court, Tuolumne County; G. W. NICOL, Judge.

Action by A. W. Stinchfield against James N. Gillis and others to recover the value of certain property alleged to have been taken by defendants. From a judgment in favor of defendants, and from an order denying a motion for new trial plaintiff appeals. Reversed.

I. M. KALLOCH and F. P. OTIS, (WHEATON, KALLOCK & KIERCE, of counsel), for appellant.

F. W. STREET, for respondents.

GAROUTTE, J. This action was brought to recover the value of certain gold alleged to have been taken by respondents from the mining claim of appellant. The facts, briefly

[1]S. C. on 2nd Appeal, 18 M. R—.

[2]*Belcher Co.* v. *Deferrari*, 62 Cal. 160. *Blake* v. *Thorn*, (Ariz.) 16 Pac. 270. *Speed* v. *McCarthy*, 181 U. S. 269.

[3]*Boston Co.* v. *Montana Co.* 89 Fed. 529; which case the State Court dissents from, in a suit between same parties on construction of same deed. 70 Pac. 1125; 71 Pac. 1005.

stated, are as follows: For many years prior to January 17, 1886, respondent Gillis was in the peaceable possession of and claiming to be the owner of a certain mining claim known as the "Carrington Claim." Upon said date he sold and transferred to appellant, by bargain and sale deed, a portion of the Carrington claim, designated as the "Pine Tree Mine." At the date of this transfer the co-respondent Rice was working upon a portion of the Carrington claim not included in the transfer to Stinchfield, known as the "Rice Vein," giving Gillis a certain percentage of all gold taken out for the use of the mine. The *apices* of a vein called the "West Vein" and of the Pine Tree vein were within the surface limit of the Pine Tree mine, and the apex of the Rice vein was in that portion of the mine not transferred to Stinchfield by Gillis. Immediately after the transfer to Stinchfield, Gillis located or relocated that portion of the mine not transferred, and within a few days thereafter Stinchfield located that portion of the mine transferred to him. The Rice vein and the West vein in their descent into the earth intersect within the surface ground purchased by Stinchfield, and at the point of intersection of these veins valuable deposits of gold were found. Rice, in following his vein into the earth, came to the point of intersection and thereupon found the deposits of gold, which he removed as his property. A few days subsequent, Stinchfield, following the West vein into the earth, arrived at the same spot, but too late. Indications pointed unmistakably to what had been but the gold was gone. Appellant claimed the gold to be his property, and brought this action to recover $10,000, the same being the value thereof. Judgment went against him, and this appeal is before us attacking the judgment and the order denying the motion for a new trial.

As between the owners of separate and intersecting veins, the ownership of the mineral contained within the space

of intersection is determined according to the provisions of section 2336 of the Revised Statutes of the United States, which reads as follows: "Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection, but the subsequent location shall have the right of way through the space of intersection for the purpose of the convenient working of the mine; and, where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

From an examination of the record it is apparent that the judgment for respondents was based upon the law quoted, taken in connection with the finding that neither Gillis nor his grantor, Carrington, ever located the Carrington claim; and the further fact that the location of Gillis, made after his deed to Stinchfield, was prior in point of time, as compared to the location of Stinchfield. This is necessarily the fact, for the court finds in express terms that the gold was taken from the point of intersection of the veins to which reference has already been made, and that such point of intersection was upon the Pine Tree mine. Under such conditions, the title to the gold would be determined by priority of title to the respective mines, and it is from this standpoint that the court decided the case. As between the plaintiff and Gillis, the locations of their respective mines, made subsequent to the deed of Gillis, are not material to any matter involved in this litigation. By bargain and sale deed Gillis conveyed the Pine Tree mine to plaintiff, particularly designating its surface boundaries. These parties occupied the relative positions of grantor and grantee, under a bargain and sale deed, with all the rights and obligations peculiar to that relation; and it is elementary that Gillis, by a subsequent location, or otherwise, could not

obtain any title which he could assert against his grantee, and thereby defeat or limit his grantee's estate, or destroy or limit any easement or right appurtenant thereto, and necessary to the enjoyment of a perfect title. By his deed respondent Gillis was estopped from denying his own title in fee at the date of that conveyance, and therefore necessarily estopped from denying a valid location by himself or his grantor as the basis of such title. If he had title to the mining claim at the date of the deed, he could only have had such title by virtue of a prior location, for title in fee necessarily implies a prior valid location. It was said in *Belcher M. Co.* v. *Defarrari*, 62 Cal. 163: "As we take notice of the character of the property and its original ownership in the United States, the defendants were estopped from denying that they and their co-grantors (or those from whom they derived) had located the mines in accordance with the laws of the United States,—the only way in which the title could be acquired." It follows that no right whatever accrued to the grantor Gillis as against his grantee, the plaintiff, by virtue of his subsequent location, and that the location of the Pine Tree mine as against the grantor Gillis, must have occurred at some time prior to his deed to Stinchfield. In *Champion M. Co.* v. *Con. W. M. Co.* 75 Cal. 78; 16 Pac. Rep. 513, it was held that defendant's location must be considered as having been made at least from the date of its patent, and here it must be considered that the location of plaintiff's mine must have been made at least as early as the date of his deed.

The deed of Gillis passed to the plaintiff the Pine Tree mine to the same extent and to the same effect that a patent from the United States would have passed it; that is, as against the grantor, he was vested with the title to this mining claim, including every vein, and every part of every vein, throughout its depth, which had its apex within the surface boundaries of the claim, subject to the provisions

of the Revised Statutes of the United States, heretofore quoted.

It is insisted that the West vein is not a vein, but a crossing. The court finds this "crossing" to be a "single small vein, dipping to the west, and having its apex in the Pine Tree mine." If this crossing, as it is termed, is a vein, (and the court has so found it to be,) its size is immaterial when considered with reference to the legal rights attached to the ownership. A "single small vein" is weighed and measured by the same law and entitled to the same consideration before the court as the mother lode, and very often is far more valuable in the eyes of its owner. In the case of *Jupiter M. Co.* v. *Bodie Con. M. Co.* 11 Fed. Rep. 675, Circuit Judge SAWYER said: "A vein or lode authorized to be located is a seam or fissure in the earth's crust, filled with quartz, or with some other kind of rock in place, carrying gold, silver, or other valuable mineral deposits named in the statute. It is not enough to discover detached pieces of quartz, or mere bunches of quartz not in place. The vein, however, may be thin, and it may be many feet thick or thin in places,—almost or quite 'pinched out,' in miners' phrase,—and in other places widening out into extensive bodies of ore. So, also, in places it may be quite or nearly barren, and at other places immensely rich. It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, at the point of discovery within the lines of the claim located, to entitle the miner to make a valid location, including the vein or lode."

By reason of the views of the court hereinbefore expressed, the finding that neither Gillis nor his grantor made a location of the Carrington claim prior to the deed to Stinchfield is immaterial, and, if material, the evidence disclosed by the record is too weak to support it. The facts as to the erection of a barricade or bulkhead by the parties between the works of the respective mines are immaterial to the questions here

involved, conceding them to be as claimed by respondent. *Stocton* v. *Garfrias*, 12 Cal. 315.

Let the judgment and order be reversed and the cause remanded for a new trial.

We concur: HARRISON, J. PATERSON, J.

Hearing in bank denied.

HOFFMAN ET AL. v. BEECHER.

(12 Montana 489; 31 Pac. 92. Supreme Court. September 15, 1892.)

[1]**No jurisdiction to Review land office ruling.** In an action brought upon an adverse claim the trial court has no jurisdiction to review the action of the officers of the land department in holding that a plat and adverse claim conformed to their rules.

[2]**No reference in complaint to the adverse.** In an action upon an adverse claim it is not necessary that it be alleged in the complaint that the action was brought in respect to the property mentioned in the adverse claim.

A variance in the description of the premises, as contained in the complaint and adverse claim, which consists in giving the general course of the last line of plaintiff's claim as southwest in the adverse claim, when it should have been southeast as given in the complaint, is harmless, where the place of beginning is designated as the terminus of such last line.

Idem. Where the lengths of the side and end lines of plaintiff's claim are reduced in the description given in the complaint from that given in the adverse claim the variance is immaterial where it appears that the defendant's claim, which is also described in the complaint, is wholly within the boundaries of plaintiff's claim.

[3]**No survey by adverse claimants.** Where an adverse claim had no accompanying plat from actual survey, the want of it being explained by physical impossibility of making survey on high ground on account of snow, but the nature, boundaries and extent of the conflict being shown as nearly as was practicable, the court will entertain the action brought in support of such adverse claim, even if they had the power to discard the action of the land office in sustaining it.

Appeal from Seventh Judicial District, Yellowstone County.

Action upon an adverse claim to determine right to possession of mining premises. Nonsuit granted, and judgment entered for defendant, by Milburn, J. Reversed.

[1]*Rose* v. *Richmond Co.* 17 Nev. 25. *Quigley* v. *Gillett*, 18 M. R.—

[2]*See note* 1 *Post p.* 548.

[3]Instance of amendment of survey allowed after judgment in suit supporting adverse claim. *Last Chance Co.* v. *Tyler Co.* 61 Fed. 557.

LUCE & LUCE, for appellants.

SAVAGE & DAY, for respondent.

BLAKE, C. J. This action was commenced by adverse claimants to determine the right of possession of a lode mining claim. The amended complaint alleges, among other things, that the plaintiffs, on the 16th day of February, 1887, and for a long time prior thereto, were the owners and in the possession of the Lake Superior lode mining claim; that the same was discovered June 23, 1882, by the grantor and predecessor in interest of the plaintiffs; that the statement and notice of the discovery and location thereof were recorded; that the defendant filed in the month of February, 1887, in the United States land office at Bozeman, his application for a patent for the Silver Queen lode mining claim, which was within the boundaries of the said Lake Superior lode mining claim; and that a notice of this application was published in a newspaper which had been designated by the proper officer. It is further alleged "that, within the statutory period of the publication of said notice in said newspaper, to-wit, on the 16th day of April, 1887, the plaintiffs filed in said land office, with the register and receiver thereof, their adverse claim under oath, showing the nature, boundaries, and extent of their adverse claim; whereupon all proceedings in said land office, to the extent and as required by law, were stayed on said application for patent by said register and receiver." The answer denies the averment of the complaint concerning the Lake Superior lode mining claim, and sets forth the title of the defendant to the Silver Queen lode mining claim. The following paragraphs relate to the adverse claim: "Denies that within the statutory period of the publication of the defendant's said notice of application for a United States patent for said Silver Queen quartz lode mining claim, to-wit, on the 16th day of April, 1887, or at all, the plaintiffs, or

any of them, filed in said Bozeman land office, with the register and receiver thereof, or with either of them, their or either of their legal notice, or their or either of their adverse claim, under oath showing the nature or boundaries or extent of their or either of their adverse claim; denies that the plaintiffs ever filed in said land office any legal notice of their or either of their alleged adverse claim." The action was tried by the court without a jury, and after the plaintiffs "rested their case" the following proceedings took place: "Thereupon the court found for the defendant as follows: (1) On the ground that the facts do not sufficiently appear to the court, either from the pleadings or the evidence, to give this court jurisdiction of the case. (2) And, if the court had jurisdiction of the case, the plaintiffs have not made out a *prima facie* case under the evidence; one of the fatal defects in the case being the variance in the description of the property in the adverse claim, and the description in the amended complaint, this being only one of the reasons upon which the court bases its ruling. Whereupon the defendant's counsel made the following statement: I would like to have the court find as a fact that the amended complaint is not in support of the adverse claim as filed. By the court: I have said for that and other reasons; I have left room enough. Whereupon at that time after the said statement of the court and the finding for the defendant upon said motion for nonsuit as aforesaid, the plaintiffs asked leave of the court to amend the amended complaint so as to make the allegations of the said complaint conform to the description and other matters contained in the adverse claim filed in the land office, and introduced in evidence in this case. Whereupon the court overruled said motion for the reasons following, to-wit: I think, in respect to that, that the court has all along lacked jurisdiction in this case because of the fact, among other reasons, that there is no allegation in the amended complaint that the action was brought in respect to the

property mentioned in a certain adverse claim; and, the court not having had jurisdiction in this case, the court could only hold in fact that no case had been commenced at all upon this adverse claim, and the time within which such action could be brought has long since expired. I will deny the request of plaintiffs. * * * Whereupon the court added to the reason already given for refusing to allow plaintiffs to amend their amended complaint the following: That the court believes there should be an end to litigation, and that this cause, in the opinion of the court, has lasted long enough on such facts as have been presented to the court." Judgment was entered accordingly, and we have quoted at length all the reasons which are given by the court for this decision upon its own motion.

The statutes of the United States regulating the procedure in these matters are as follows: "Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim." Rev. St. U. S. § 2326.

Did the plaintiffs file an adverse claim in the United States land office in compliance with the law? This is the first question which arises in the investigation of the foregoing rulings of the court. It is shown by the transcript that the plaintiffs filed the following papers with their adverse claim: The affidavits of seven persons; copies of the locations

of the Lake Superior lode mining claim, the Young America lode mining claim, and the Homestake lode mining claim; two plats of the Lake Superior lode mining claim; and an abstract of title to the Lake Superior lode mining claim.

The court below seems to have been of the opinion that the plaintiffs followed the law in this respect, but the respondent asserts in his brief that the boundaries and extent of the adverse claim are not specified. This document states that the plaintiffs were "the lawful owners and entitled to the possession of one thousand one hundred and forty (1,140) feet of the said Silver Queen lode or mine, and all the surface ground thereof described in said application for patent, as shown by the diagram of said mining claim posted on said claim, and the copy thereof filed in the said land office with said application for patent." This allegation regarding the boundaries and extent of the adverse claim is supported by the affidavits and plats showing that the Silver Queen lode mining claim is contained within the Lake Superior lode mining claim. The general land office has issued rules for the guidance of the registers and receivers of the land districts. The respondent insists that the plaintiffs did not observe the requirement that the "plat must be made from an actual survey by a United States deputy surveyor, who will officially certify thereon to its correctness; and in addition there must be attached to such plat of survey a certificate or sworn statement by the surveyor as to the approximate value of the labor performed or improvements made upon the claim by the adverse party or his predecessors in interest, and the plat must indicate the position of any shafts, tunnels, or other improvements, if any such exist, upon the claim of the party opposing the application, and by which party said improvements were made." Rule No. 86.

The Supreme Court of Nevada in *Rose* v. *Mining Co.* 17 Nev. 55, decided against the position of respondent upon a ground which we are inclined to favor, and says: "The claim

of respondent that the protest does not show 'the nature, boundaries, and extent' of the Uncle Sam location and lode is untenable. This objection is one that should, if relied upon, have been made in the land office when the protest was filed. It is questionable whether any objection could be urged against the protest after the commencement of the suit, especially in a case where no plea has been interposed to its sufficiency." This case was affirmed by the Supreme Court of the United States. 114 U. S. 576; 5 Sup. Ct. Rep. 1055. We are of opinion that the court below did not have jurisdiction to review the action of the officers of the land department in holding that a plat and adverse claims conform to their rules. We assume, for the sake of argument, that we have the power to inquire whether this adverse claim has been framed in accordance with the act of congress. We concur in the views of the Honorable S. J. Kirkwood, the secretary of the interior, in the *Case of Wallace*, 1 Dec. Dep. Int. 593: "But, if application for patent in any case should be made at a time when it is impossible to secure a survey of a claim adverse thereto, then, as the law does not require impossibilities, the adverse claimant might show the nature, extent, and boundaries of his claim as nearly as practicable from information within his reach, and present under oath his reasons for not following more clearly the regulations of your office, and submit whether, under all the circumstances, he had not properly presented an adverse claim." It is stated therein that Mr. Wallace represented that it would be impossible to procure surveys during a certain period for adverse claimants on account of the "severity of the climate" and "deep snows". The affidavits of Hoffman, Shoolbred, and Randall were filed in support of the adverse claim, and were, in substance, that the Lake Superior lode mining claim is located over 11,000 feet above the level of the sea; that the snow falls in that vicinity to a great depth; and that no survey of said claim could be made

between the 1st day of December, 1886, and the month of July, 1887. These statements are not controverted, and must be treated as facts, and an examination of the record proves that the officers of the Bozeman land district followed the *Case of Wallace, supra.* The plaintiffs exerted all their efforts to yield obedience to the statute *supra*, and are entitled to vindicate their adverse claims in the courts.

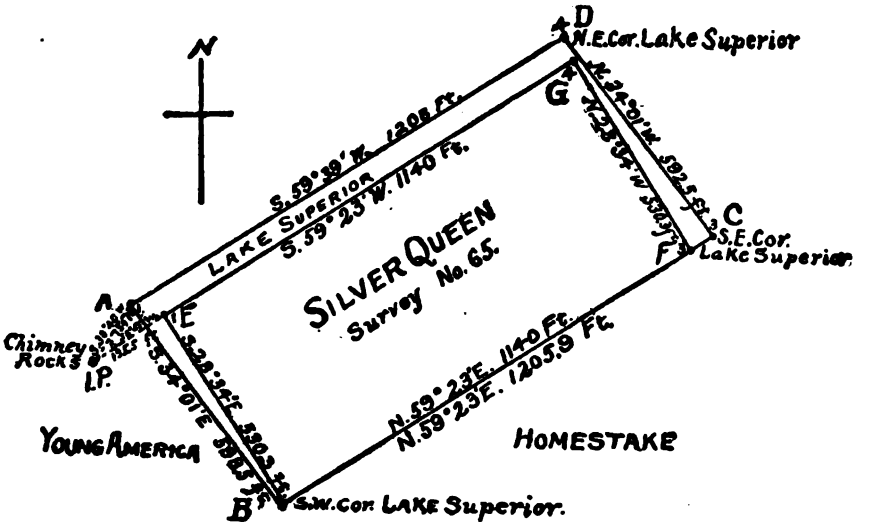
We should keep in view the primary object of this legislation, which is to obtain an adjudication in a competent tribunal of the controversy of *bona fide* claimants to mineral lands, in order that the patent of the United States may be issued to the rightful party. Mr. Justice MILLER, in *Mining Co.* v. *Rose, supra*, said: "Looking at the scheme which this statute presents, and which relates solely to securing patents for mining claims, it is apparent that the law intended, in every instance where there was a possibility that one of these claims conflicted with another, to give opportunity to have the conflict decided by a judicial tribunal before the rights of the parties were foreclosed or embarrassed by the issue of a patent to either claimant." In this connection we will notice the ruling of the court that there was no allegation in the complaint that the action was brought in respect to the property mentioned in the adverse claim. Our courts have not held that this pleading was necessary, and the sufficiency of the complaint, like that before us, has not been questioned. *Wolverton* v. *Nichols*, 5 Mont. 89; 2 Pac. Rep. 308; *Mining Co.* v. *Hammer*, 6 Mont. 53; 8 Pac. Rep. 153; *Milligan* v. *Savery*, 6 Mont. 129; 9 Pac. Rep. 894; *Renshaw* v. *Switzer*, 6 Mont. 464; 13 Pac. Rep. 127; *Flavin* v. *Mattingly*, 8 Mont. 242; 19 Pac. Rep. 384. In *Mining Co.* v. *Hammer, supra*, Mr. Justice GALBRAITH for the court said: "Now, although the courts of this territory, in determining the title to mining claims where there is a dispute in relation thereto in the land office, have adopted the forms of action by which title to land is tried, which may be either

by the action of ejectment or to quiet title, yet the real question to be determined is, who is entitled to the patent from the United States government to the mining claim in controversy? Or, in other words, who has become the purchaser of the mining claim, and divested the title of the government thereto, by complying with the requirements of the laws of congress relative to acquiring title to mineral lands?" This case was affirmed by the Supreme Court of the United States. 130 U. S. 291; 9 Sup. Ct. Rep. 548. An abridgement of the pleadings appears in the opinions in the last case, and illustrates the general character of the allegations which are deemed material. No averment to the effect referred to by the court below is contained in the complaint in *Mining Co.* v. *Hammer*, *supra*. An analysis of the issues in the case at bar demonstrates the purposes for which the parties are engaged in this litigation, and that the adverse claim is the foundation of the action, and that appropriate relief will be granted upon the ultimate facts.

Let us examine the description of the Lake Superior lode mining claim in the amended complaint: "Beginning at a stake in the eastern side line of the Young America quartz lode mining claim, being the northwest corner of said Lake Superior claim, from which the Chimney Rocks initial point bears S., 30 deg. 40 min. W., 159 feet; thence S., 34 deg. 1 min. E., 598.5 feet, to a stake in the eastern side line of said Young America claim, it being the southwest corner of said Lake Superior claim, and corner No. 2 of official survey No. 65, of the so-called 'Silver Queen Lode,' hereinafter mentioned, and the northwest corner of the Homestake quartz lode mining claim; thence N., 59 deg. 23 min. E., 1,205.9 feet, to a stake the northeastern corner of the said Homestake claim, and the southeastern corner of said Lake Superior claim; thence N., 34 deg. 1 min. W., 592.5 feet, to a stake the northeastern corner of the said Lake Superior claim; thence S., 59 deg. 39 min. W., 1,206

feet, to the place of beginning, containing 16.45 acres, more or less; being in township No. 9 S., of range No. 15 east, approximately, and on unsurveyed land."

The description of the Silver Queen lode mining claim is as follows: "Beginning at corner number one, a limestone twenty-four inches by fourteen inches by six inches, marked '1–65,' from which the Chimney of Rocks initial point bears south, 56 deg, 55 min. west, 196.5 feet; thence south, 28 deg. 34 min. E., 530.3 feet, to corner number two, (2), a pine post five inches square and four feet long, marked '2–65'; thence north, 59 deg. 23 min. E., 1,140 feet, to corner number three, (3), a pine post five inches square and four feet long, marked '3-65'; thence north, 28 deg. 34 min. west, 530.3 feet, to corner number four (4), a pine post five inches square, four feet long, marked '4–65'; thence south, 59 deg. 23 min. west, 1,140 feet, to corner number 'one,' the place of beginning, containing 13.87 acres, and further known as United States mineral survey number sixty-five, (65)." The accompany-



ing plat shows each parcel of mineral land, and is a clear demonstration that this action was commenced to determine the right of possession to the same property which is claimed by the respondent.

The letters A, B, C, D represent the corners of the Lake Superior lode mining claim. The letters E, B, F, G, represent the corners of the Silver Queen lode mining claim. The main proposition which controlled the court below is the alleged fatal variance in the descriptions of the premises by the plaintiffs in the amended complaint and the adverse claim. What are the allegations of the complaint upon this subject? That the mining claim of the plaintiffs is situate on the northerly end of Henderson mountain, in the New World mining district, in the county of Park, formerly the county of Gallatin, territory of Montana; that the same "is known as the 'Lake Superior Quartz Lode Mining Claim,' bounded and described" as above specified. It is also alleged that Edward Hayes discovered, June 23, 1882, said claim, and recorded his statement and notice of discovery and location thereof; that Hayes was the grantor and predecessor in interest of plaintiffs; and that the mineral land for which the defendant filed his application for patent is part of and "wholly within the boundary of said Lake Superior quartz lode mining claim," and is 1,140 feet in length, and 530 feet in width. What is the description of the Lake Superior mining claim in the adverse claim of plaintiffs? The statement of discovery thereof recites these facts: The mining claim is "designated and named the 'Lake Superior Quartz Lode Mining Claim,' " and is situate on the northerly end of Henderson mountain, in the New World mining district, county of Gallatin, territory of Montana; and "bounded on the south by the Homestake lode, and on the west by the Young America, both of which it joins." It is also stated, that this claim was discovered June 23, 1882, by Edward Hayes, who caused the notice of location thereof to be prop-

erly recorded. A stake was set at the discovery shaft, and each corner was marked by "substantial posts or monuments of stone." The following description also appears in the notice: "Beginning at a stake standing on the easterly side line of the Young America lode about 500 feet from its N. E. corner; thence easterly 1,500 feet, to a stake; thence N. W. 600 feet, to a stake; thence westerly 1,500 feet, to a stake; thence S. W. 600 feet, to the place of beginning." It is further shown in the adverse claim that said Hayes was the grantor and predecessor in interest of the plaintiffs, and that the Silver Queen lode mining claim is located within the boundaries of the Lake Superior lode mining claim, and is 1,140 feet in length and 530 feet in width. There is no variance in the respective descriptions, of which the law would take serious notice, and the material parts are in harmony.

It is true there were discrepancies which were produced by the omission of the plaintiffs for the foregoing reasons to have a survey of the premises made in conformity with the regulations, and the substitution of the best evidence in lieu thereof. This, however, is the inevitable result when the metes and bounds of a lode mining claim are defined at the time of discovery and location by a person who is not a mineral land surveyor. The general course of the fourth or last line of the Lake Superior lode mining claim is stated to be southwest, when it should have been southeast, but the terminus is the place of beginning, and the mistake is harmless. Said the court in *Castro* v. *Barry*, 79 Cal. 448; 21 Pac. Rep. 946: "The wrong course is controlled by the directions to go 'down the said slough' to a specified point. Courses and distances yield to visible boundaries." *Pollard* v. *Shively*, 5 Colo. 309; *Cullacott* v. *Mining Co.* 8 Colo. 179; 6 Pac. Rep. 211. There are also slight changes in the lengths of the end lines of the Lake Superior lode mining claim which are reduced respectively from 600 feet to 598.5 feet and 592.5 feet. The lengths of the side lines

are reduced respectively from 1,500 feet to 1,206 feet and 1,205.9 feet. Charles E. Tappan testified on the trial that he was a deputy United States mineral surveyor, and surveyed the Silver Queen lode mining claim, and that "the Lake Superior embraced all the ground of the Silver Queen. As near as I can remember in making said survey, I found the stakes of the Lake Superior claim on the southwest, southeast, and northeast corners of the Lake Superior lode. I don't remember positively about the northwest corner of the Lake Superior claim." Mr. Justice FIELD, in *Hammer* v. *Mining Co. supra*, said: "Mining lode claims are frequently found where there are no permanent monuments or natural objects other than rocks or neighboring hills. Stakes driven into the ground are in such cases the most certain means of identification." A review of all the evidence satisfies us that the court erred in rendering judgment for the defendant.

It is therefore ordered and adjudged that the judgment be reversed, and that the cause be remanded for a new trial.

HARWOOD and DE WITT, JJ., concur.

HARTFORD IRON MINING CO. v. CAMBRIA MINING CO.

(93 Michigan 90; 53 N. W. 4. Supreme Court. Oct. 4, 1892.)

[1]**Lessee may maintain trover for ore taken.** When plaintiff is in possession of land under a mining lease which gives him the exclusive right to mine for a certain term of years, subject to the payment of a royalty, and requires him to mine 7,000 tons each year, and as much more as can reasonably be mined on the land, and by which he is bound to pay for 7,000 tons each year, whether mined or not, but with the privilege of crediting any such payment for ore not mined on ore mined in excess of 7,000 tons in any succeeding year, he has such property in the ore before it is mined that he can maintain trover against one who mines it without his consent.

Measure of damages. In such an action plaintiff may recover damages equal to the value of the ore mined, less the actual cost of mining it, and less any royalty which may have been paid by defendant to plaintiff's lessor.

[2]**Defense of ore taken by party in possession.** In such an action it is no defense that defendant mined the ore while in possession under claim of right, when his only possession was that which enabled him to convert the ore.

Error to Circuit Court, Marquette County; JOHN W. STONE, Judge.

Action by the Hartford Iron Mining Company against the Cambria Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

A. B. ELDREDGE and BALL & HANSCOM, for appellant.

F. O. CLARK, for appellee.

MONTGOMERY, J. This is an action of trover to recover the value of iron ore. The plaintiff recovered, and the defendant brings error. The case has once before been con-

[1]*Wilson* v. *Hoffman*, 93 Mich. 72; 52 N. W. 1037.
[2]Compare *National Co.* v. *Weston*, 17 M. R. 143.

sidered by this court, and is reported in 80 Mich. 491, 45 N. W. 351. The land leased to plaintiff comprised the east half of lot 5 and lots 6 and 7, in section 36, township 48 N., range 27 W. The defendant was the lessee of the west half of lot 5, and the question chiefly considered on the former appeal was whether the true dividing line was one leaving an equal acreage on either side thereof, or one equidistant from the east and west corners. This question was ruled in accordance with the contention of plaintiff, namely, that each party was entitled to occupy one half in quantity. The defendant acquiesces in this ruling, but it alleges errors in other rulings of the court.

It is first contended that plaintiff has no title which entitles it to maintain trover, even if the defendant be held to be a wrong doer. The rights of plaintiff in the ore are defined by a lease, or license, containing terms and provisions as follows:

"The party of the first part, for and in consideration of the rents, royalty, covenants, and agreements hereinafter mentioned and stated, on the part of the said party of the second part to be paid, observed and performed, has licensed, and by these presents does license, the party of the second part to enter upon the following described tracts or parcels of land * * * with the right to mine, ship, dig, and carry away therefrom such iron ore as may exist or be discovered thereon, for the term of twelve years from and after the first day of June, A. D. 1887, * * * subject to the conditions, covenants limitations and agreements hereinafter made, as follows: Said second party shall have the exclusive right to mine iron ore on said lands, and ship and carry away the same, during the term aforesaid. The party of the second part shall not cut or use any timber growing on said lands, without the consent, in writing, of the party of the first part; but it may erect such houses and machinery as may be necessary to conduct its mining operations on said land. The right of possession of said lands not occupied by said second party

for mining purposes shall always remain in said first party, its successors and assigns, who shall have the same right to use and occupy said lands as though these presents were not executed, whenever the same does not manifestly or evidently interfere with the mining operations of said second party. Said second party shall pay a royalty of fifty cents to said first party on each and every gross ton of iron ore mined on said land during the term, and shall diligently and constantly prosecute the mining operations during said term. * * * Said second party shall mine not less than seven thousand gross tons each year during said term, and so much more as can be reasonably mined on said land; and said second party shall pay a royalty on at least 7,000 tons each year, payable monthly, *pro rata*, during the shipping season, no matter whether mined or not. In case said second party does not mine 7,000 gross tons of iron ore in any one year, and pays royalty as aforesaid, he shall be credited for the royalty so paid on the excess mined over 7,000 tons in any succeeding year. * * * Said second party shall, in due season, pay, or cause to be paid, all taxes and assessments, general and special, ordinary and extraordinary, that may be assessed or levied on said land or premises * * * and at the expiration of said term of twelve years the said second party will peaceably and quietly leave, surrender and yield up the possession of said lands to said first party, its successors or assigns."

The instrument contained a further provision for re-entry in case of failure to perform on the part of the second party, and a covenant that,

"After the fulfillment of the covenants and conditions of this lease by the party of the second part, and on the expiration of this lease, he may remove from the said premises all houses erected by him on the land, or machinery put upon the same."

The defendant's contention is that the plaintiff is, under

this instrument, a mere licensee, and that a licensee who is privileged by his license to mine ore has no such beneficial interest or title in the ore before it is severed from the realty as to entitle him to bring trover against one who enters upon the land and mines it without his permission. Defendant's counsel cite, as sustaining this proposition, *Grubb* v. *Bayard*, 2 Wall. Jr. 81; *Brandt* v. *McKeever*, 18 Pa. St. 70; *Iron Co.* v. *Wright*, 32 N. J. Eq. 248; *Baker* v. *Hart*, 123 N. Y. 470; 25 N. E. Rep. 948; *Gillerson* v. *Mansur*, 45 Me. 25.

In *Grubb* v. *Bayard*, it was held that, under the general terms of the license in question, the licensee was privileged to enter, upon the lands and mine the ore or not, as he saw fit. The words employed were "full and free liberty to dig all metals and minerals throughout the demised lands." It was held that this language did not exclude the owner of the soil from mining, and that, therefore, no title vested in the licensee in the ore until actually mined.

In *Brandt* v. *McKeever* it was held that a statute which gave the right to dig and mine for iron, coal, limestone, sand and gravel, fire clay, and other minerals, did not grant a right to the soil, but a right to mine and dig in it, and to take to the use of the warrantee the product of his digging and mining, and everything he should have made his own by the impress of his labor, but nothing else; that a grant of the right to dig and mine conveys no more than a license to take and appropriate the minerals beneath the soil, but vests no property in them until they are taken and appropriated; that under the statute in question the plaintiff had no better right than had the defendant to the sand deposited, or, rather, that the right to it was exclusively in the state.

In *Iron Co.* v. *Wright*, it was said:

"A license may confer either a sole or exclusive right, or simply a right in common. If it simply confers a right to dig and take ore or to work a mine, it is not exclusive, and the licensor may himself take ore from the same land or mine,

or license others to do so. And when it authorizes the licensee to dig and carry away all the ore to be found in certain lands, it does not confer an exclusive right. If it be merely a license, and no estate or property in the land is passed, the licensee acquires no title to the ore until he has severed it."

And it was said, as to the defendant's right in that case:

"His license was unexecuted; he obtained it without paying a consideration for it, and had done nothing under it which rendered its revocation, either as a matter of law or conscience, unfair or unjust. If his license invested him with no estate or interest in the land, and no equities have been raised in his favor by an expenditure of money or labor under it, it is difficult to understand by force of what legal or equitable rule it can be said to possess the least efficacy after the person who granted it has ceased to have any interest in, or dominion over, the lands upon which it was intended to operate."

In *Baker* v. *Hart* it was held that the plaintiffs, under a grant to them of the sole and exclusive right of entering in and upon the lands for the purpose of "quarrying, cutting, crushing, and removing stone for the term of ten years, but not to hold possession of any part of said lands for any other purposes," acquired no such right in the unquarried stone as entitled them to maintain trover against a wrongdoer. It was said in that case, however, that "a right to take all the stone on the land without restriction in time or quantity might readily be held to transfer its ownership," and that, under the facts in the case under consideration, undoubtedly the act of defendants was an infringement of their rights, for which they could recover such damages as they in fact sustained.

The case of *Gillerson* v. *Mansur* is not in point. Plaintiff in that case rested his claim of title upon the permit to take the timber which defendants had appropriated, within a specified time, and not after, and upon certain conditions.

The timber had not been cut by the plaintiff, and, by the terms of the permit, the original owner was to have the original and complete ownership and control of all timber to be cut upon the land, and it was further stated as a fact that it did not appear that the conditions by which the timber could be cut were ever fulfilled in any respect. And it was said:

"Nothing is exhibited in the case that Gilman had not the title and right of possession exclusively to the property replevied, and the issue that the plaintiff had no right of possession therein must have been for the defendants on the evidence introduced."

The cases above referred to which bear upon the question of license sustain the proposition that a naked licensee who has not reduced the property to possession has not such a right in the property as enables him to maintain trover, but we think the present case is clearly distinguishable from those referred to. It further appeared, in the present case, that the plaintiff was actually given possession for the purposes of mining. It was, by the terms of its lease, granted the exclusive right to mine during the period of 12 years; and furthermore, was required by the terms of its contract to mine not less than 7,000 tons per year, and to pay for so much, whether mined or not, and also was required to mine so much more as could be reasonably mined on such land. In such a case it is a contradiction of terms to say that one who has a right to mine ore, and who is bound to take out a given amount of ore in a stated time, and who is likewise bound to pay for it, whether mined or not, and who is entitled to possession for that purpose, and who has taken possession for that purpose, has no property in the ore which is actually mined by a wrongdoer. If it be held that it has not, it must be because it has no interest in the ore that lies in the ground. But it has an interest; it has obligated itself that this ore, to the extent at least of 7,000 tons per year, and so much more as can be reasonably mined, shall

be taken *out of the ground, and that it shall pay* to the licensor a royalty upon that amount of ore, whether mined or not, and, if not mined, it has an interest to the extent of the royalty in the unmined ore, and receives credit for that the following year. This right to mine during the 12 years is irrevocable, and no ore could be taken out without damaging the plaintiff to the extent of the difference between the value of the ore and the cost of production. The language of the lease does not leave it doubtful whether the right is exclusive of the lessor. The rights reserved to the lessor are only such as shall not interfere with the possession of the lands by the plaintiff. Neither the lessor nor a wrongdoer had the right to enter upon the lands for the purpose of mining. We think the circuit judge was right in holding that, under these circumstances, the plaintiff had such title to this ore as entitled it to maintain this action. But it is contended that, during the time that the main part of the ore in question was taken out, the defendant was in the actual possession of the land under a claim of right, and that trover cannot, therefore, be maintained. But the only possession of this particular strip in question which defendant had was such as enabled it to mine and convert the property in question. We think that, under these circumstances, trover will lie. *Busch* v. *Nester*, 70 Mich. 525; 38 N. W. Rep. 458.

It is also contended that the plaintiff was estopped from maintaining this action by the acts of its officers, but a careful examination of the record satisfies us that the question is not materially different from that presented on the former hearing, when this question was determined adversely to the contention of defendant.

The rule of damages adopted was sufficiently favorable to the defendant. The plaintiff was allowed to recover the value of the ore mined, less the actual cost of producing it, and less the royalty which was paid by defendant to the owner.

It was competent to show by the witness Metheral what it would cost per ton to mine the ore. He had shown himself competent to express an opinion upon this subject.

We have considered the other points presented by the record, but discover no error, and *the judgment will be affirmed, with costs.*

GRANT, J., took no part in the decision, for the reason that he was the circuit judge before whom the case was first tried.

The other justices concurred.

JOHN GLASGOW v. CHARTIERS OIL CO.

(152 Pennsylvania 48; 25 Atl. 232. Supreme Court. Oct. 18, 1892.)

[1]**Lessees right where not bound by covenants, to elect to forfeit.** One who takes an oil lease, conditioned to be void unless he shall do something in the way of development by putting down a well within a certain time, or unless he pay so much per month in money, but without covenanting to do either, and who in fact does nothing in the way of development, and makes payments only for a short time, cannot be compelled to continue such payments, but may insist on forfeiting his rights. *Ray* v. *Gas Co.* 138 Pa. St. 576; 17 M. R. 374 distinguished.

Appeal from Court of Common Pleas, Butler County; AARON L. HAZEN, Judge.

Action by John Glasgow against the Chartiers Oil Company to recover certain payments alleged to be due under an agreement of lease. Plaintiff appeals from order refusing a motion for judgment on account of an insufficient affidavit of defense. Affirmed.

McJUNKIN & GALBREATH, for appellant.

NEWTON BLACK, H. A. MILLER and EDWIN S. CRAIG, for appellee.

WILLIAMS, J. This appeal depends on the construction that should be given to the contract made by the parties on the 10th day of June, 1890. It is called "an agreement of lease." An examination of its provisions shows it to be a demise of the oil and gas under the grantor's tract of land in

[1] *Van Etten* v. *Kelly*, 66 Oh. St. 605; 64 N. E. 560. *Brooks* v. *Kunkle*, 24 Ind. App. 624; 57 N. E. 260.

Construction of lease determinable at the will of either party. *Diamond Co.* v. *Curless*, 22 Ind. App. 346; 52 N. E. 782.

See *Bartley* v. *Phillips*, 18 M. R.— for note on the right to declare forfeiture usually belonging to the lessor only: Also *Leatherman* v. *Oliver*, *Post* p. 526.

Clinton township, Butler county, and of the right to go upon and operate the land for oil and gas purposes. The lease, or right granted, is to continue for five years, and as much longer as oil or gas shall be found in paying quantities on the tract. The consideration for the grant is a bonus of $100, and a rent or royalty of one-eighth part of the oil produced. If gas be obtained, the rental is fixed at $300 per year for each well producing gas in quantity sufficient to justify marketing it. The agreement then proceeds as follows: "Provided, however, that this lease shall become null and void, and all rights hereunder shall cease and determine, unless a well shall be completed on the premises within one month from the date hereof, or unless the lessee shall pay at the rate of one hundred dollars monthly in advance for each additional month." etc. There is no express covenant, promise, or undertaking, by the lessee to be found anywhere in the agreement. A covenant to operate within a reasonable time might be implied from the nature of the instrument, but the lessee has been careful to make no express promise to operate the lease, or to do anything towards the development of the land. If he does nothing, the penalty for his inaction is fixed. It is the forfeiture or loss of his rights under the agreement. But if he thinks it an object to do so, he may prevent the assertion of this forfeiture by paying $100 in advance of the 1st day of the next month after the date of the contract, and, upon such payment, the right of forfeiture is postponed one month. This he may do month after month as long as he pleases, or until the end of five years. If, however, he puts down no well during the first month, and pays no money in lieu of it, his rights are at an end, and the lessor may assert the forfeiture. This looks like an improvident agreement, and, as the learned judge of the court below suggests, may have been obtained by artifice; but no fraud is alleged, and the question is therefore one of construction only. Its legal effect is to confer

on the grantee the right to explore for oil on the tract described. If he does not exercise this right within one month, it is lost to him, unless he chooses to pay $100 in advance as the price of another month's opportunity to explore. If he does exercise it, and finds nothing, he is under no obligation to continue his explorations. If he explores, and finds oil or gas, the relation of landlord and tenant or vendor and vendee is established, and the tenant would be under an implied obligation to operate for the common good of both parties, and pay the rent or royalty reserved. In this case, he did nothing in the way of development, and, after the payment of $100 per month for the delay for a short time, he ceased to pay. The appellant contends that because he might pay under the terms of the contract he may be compelled to pay; but payment was the means provided by the contract by which the exercise of the right of the lessor to assert a forfeiture could be postponed. If the lessee did not wish to postpone the exercise of such right, he had only to refrain from making the payment. This case is not ruled by *Ray* v. *Gas Co.* 138 Pa. St. 576; 20 Atl. 1065, and kindred cases. There the lessor had an election whether to assert the forfeiture provided for, or waive it, and proceed upon the covenants of the lessee. We said in these cases that a lessee could not set up his own broken covenants to shield him from liability. It was his duty to perform them. If he failed, his lessor could elect in what way to enforce them. He might assert the forfeiture, and re-enter, or sue upon the broken covenants. Unfortunately for the plaintiff in this case, he has no covenants on which to sue. The learned judge reached a correct conclusion, and *the judgment is affirmed.*

[1]M. F. LEATHERMAN ET AL. v. JAMES B. OLIVER.

(151 Pennsylvania 646; 25 Atl. 309. Supreme Court. Nov. 3, 1892.)

[2]**Clauses in a lease that default shall render it null and void, or that it cannot be renewed without lessor's consent and that no right of action shall accrue for breach etc. do not extinguish the lease *ipso facto* but are for the lessor's protection and he, to determine the lease, must assert the forfeiture.**

Appeal from Court of Common Pleas, Allegheny County.

Suit on a lease by M. F. Leatherman and others against James B. Oliver. Judgment for plaintiffs. Defendant appeals. Affirmed.

W. B. RODGERS, for appellant.

CHAS. G. MCILVAIN and G. W. WURZELL, for appellees.

WILLIAMS, J. The question raised in the court below, and in this court, is over the sufficiency of the affidavit of defense. The contract sued on is what is commonly called an "oil lease," made by the plaintiffs to the defendant, which covers 155 acres of land; and which was to continue for five years, "and as much longer as oil or gas should be found or the rental paid thereon." The lessee agreed to complete a well on the leased premises within six months, "or, in default thereof, pay to the party of the first part for further delay an annual rental of five hundred dollars, payable quarterly in advance." It is conceded that the lessee did not complete a well on the prem-

[1]Reaffirmed *Conger* v. *National Co.* 165 Pa. 561; 30 Atl. 1038.

[2]*Edmonds* v. *Mounsey*, 15 Ind. App. 399; 18 M. R. *Jackson* v. *O'Hara*, 183 Pa. 233; 38 Atl. 624. *Cochran* v. *Pew*, 159 Pa. 184; 28 Atl. 219. *Evans* v. *Consumers Co.* (Ind.) 29 N. E. 398. *Galey* v. *Kellerman*, 17 M. R. 164. *Bartley* v. *Phillips*, 18 M. R.—

For lease determinable at will by lessee. See *Ante* p. 523.

ises or pay the yearly rental in lieu thereof. The plaintiff insisted that, having given the defendant the benefit of an exclusive right to bore for oil or gas upon his farm in accordance with the terms of the lease, he is entitled to performance on the part of his lessee, and accordingly sues to recover a year's rent, which the lease fixes at $500. The defendant replies, in substance, that it is true he promised to complete a well within six months, or pay the rental until he should do so; but that it is also stipulated in another part of the same instrument that he shall be under no obligation to do either. The clause relied on to operate as a release from his covenants is as follows: "And a failure to complete such well or pay said rental for ten days after the time specified for so doing shall render this agreement null and void, and it can only be renewed by mutual consent; and no right of action shall, after such failure, accrue to either party on account of a breach of any promise or agreement herein contained." The contention of the defendant is that this clause relieves him from all liability for any breach of his covenants, and takes away from the plaintiffs any possible form of legal remedy or redress.

In considering the legal effect of the anomalous provision in the lease before us, two well-established rules of construction should be borne in mind. One of these is that words should be taken most strongly against him whose words they are. The other asserts that, between two or more conflicting constructions of an instrument, that one should ordinarily be adopted that will sustain most of its provisions. Turning now to the lease, we find it contains a plain, unequivocal promise or covenant to complete a well on the premises within six months from the date of the contract, "or, in default thereof, to pay to the party of the first part for further delay an annual rental of five hundred dollars." Under the express words of this promise, the rental is payable quarterly in advance, and the first payment fell due at the end of six months from the date of the contract, unless a well had been completed on or

before that day. A right of action accrued at that time. The liability of the lessee was fixed. The clause relied on by the defendant provides, first, that, if no well is drilled, and the rent remains unpaid for 10 days after it is due, the agreement shall be null and void, and shall not be renewed, except by mutual consent. This, as we have repeatedly said, is for the protection of the lessor, and not of the defaulting lessee. *Galey* v. *Kellerman*, 123 Pa. St. 491; 16 Atl. 474; *Wills* v. *Gas Co.* 130 Pa. St. 222; 18 Atl. 721; *Ogden* v. *Hatry*, 145 Pa. St. 640; 23 Atl. 334. The lessor may, in this way, rid himself of a lessee who will do nothing; or he may, at his election, resort to his legal remedies upon the contract. The words mainly relied on by the defendant are those that assert that "no right of action shall, after such failure, accrue to either party on account of a breach of any promise or agreement herein contained." To what do the words "after such failure" relate? They must relate to the failure described in the preceding sentence, and that is not the failure to drill a well within six months, or to pay the rent on the day it falls due, but a continued failure to make such payment for ten days after it fell due. The lessor cannot re-enter and treat the rights of the lessee as forfeited or abandoned on the day the default happens, but he must give the lessee ten days of grace, in which to come in and make payment, before he can take advantage of the default to terminate the lease. When the ten days have expired, if the lessor asserts the forfeiture, the contract becomes null and void from that day forward. It can only be revived by agreement. Out of this now extinguished relation, created by the contract, no right of action can accrue. The covenants have ceased to bind. The agreement itself is at an end.

But the lessor in this case did not choose to insist on the forfeiture when the ten days expired. No one could assert it for him, except under his direction. No one could compel him to assert it. Certainly the defendant, who had promised

to drill a well or to pay the rental of $500 per year, if he failed to complete a well within six months, and as against whom a right of action had accrued upon the happening of his default, could not compel his lessor to re-enter for his, the lessee's benefit. He might surrender. He could divest himself of his interest in the lease, but he could not strip his lessor of his rights under that instrument, or of a cause of action already accrued. But let us suppose the lessor had entered, asserted the forfeiture, and made a new lease to other parties for the same farm. This would have extinguished the rights, and with them, the obligations, of the lessee for the future. The contract would have become thereby null and void from and after the day when the forfeiture was asserted, and no cause of action thereafter accruing upon the covenants of the lease could be asserted. This is quite clear. But such action by the lessor could not operate as a release of the defendant from liability, by reason of any right of action which had already accrued. That is a result not among the legal consequences of the re-entry, and not "nominated in the bond" on which the defendant relies. The construction of this agreement which we have adopted does violence neither to its letter nor its spirit. It gives its appropriate office to every covenant in it, and makes the contract itself a reasonable and an honest one.

The judgment of the court below is for these reasons affirmed.

JOHN E. JONES ET AL. v. THE PROSPECT MOUNTAIN TUNNEL COMPANY.

(21 Nevada 339; 31 Pac. 642. Supreme Court. Dec. 29, 1892.)

Sufficient denial of plaintiff's ownership. Where the complaint alleges that the plaintiffs are the owners and in possession of a mine, an answer which denies that they are the owners or in possession of a certain part of the mine, describing it, does not admit plaintiffs' ownership of that part. Nor do the facts that the answer also alleges that the defendant is the owner of that part of the mine, and that a certain ledge therein found apexes outside the plaintiffs' boundary lines, constitute such an admission.

Patent does not convey lodes apexing outside. A patent from the United States for mining ground does not convey to the patentee the veins or ledges which apex outside the boundary lines of the mine, extended downward vertically, and the mine owner is not necessarily the owner of such veins.

[1]**Presumption. Burden of proof on apex claimant.** The presumption, in the first instance, is that the owner of a mine owns all the veins found within his boundary lines, but, when there is evidence tending to prove that the vein in controversy apexes outside those lines, this, if sufficient, will rebut that presumption; and as the burden of proving ownership is, when denied, always upon the party alleging it, he must also meet and overcome this evidence, or he will fail in establishing his title.

[2]**By "rock in place," as used in the mining statutes, is meant rock that is enclosed and embraced in the general mass of the mountain, as distinguished from the float, soil, and debris of the surface; and it is not material where the rock or mineral was originally formed or deposited, or that the vein matter is loose or broken or disintegrated.**

Notice, proof of claim of title. Adverse possession to ripen into title must be based on claim of title hostile to another title—and to prove such hostile assertion of title a location notice asserting it is admissible evidence.

Appeal from District Court, Eureka County; G. F. TALBOT, Judge.

[1]*Cons. Wyoming Co.* v. *Champion Co.* 63 Fed. 540; 18 M. R.—*Wakeman* v. *Norton*, 24 Colo. 192; 18 M. R.—*Bell* v. *Skillicorn*, 6 N. Mex. 399; 28 Pac. 768. *Maloney* v. *King*, 25 Mont. 188; 64 Pac. 351.

[2]*Stevens* v. *Williams*, 1 M. R. 557. *Tabor* v. *Dexter*, 9 M. R. 614. *Leadville Co.* v. *Fitzgerald*, 4 M. R. 380.

Action by J. E. Jones and others against the Prospect Mountain Tunnel Company to recover the price of ore unlawfully removed from complainants' mine, and for an injunction restraining defendant from removing any more. Plaintiffs had judgment for $5,000, and an injunction was granted. Defendant appeals. Reversed.

The other facts fully appear in the following statement by the Justice delivering the opinion.

Action brought to recover $50,000 damages, as the value of 1,000 tons of ore unlawfully extracted from the Colorado mine, and for an injunction restraining defendant from entering upon or further extracting any ore therefrom. The complaint alleged the plaintiffs' ownership and possession, the defendant's trespass, and set up facts looking to equitable relief. The material parts of the answer are as follows: The defendant "denies that at the time mentioned in said complaint, or at any other time, it wrongfully or unlawfully entered into or upon the mining claim described in the plaintiffs' complaint, or that at said time or at any other time it excavated or removed from said mining claim any ore or mineral-bearing rock, or that at said time or at any other time it converted any ore or mineral-bearing rock excavated or removed from said mining claim to its own use, or that the ore plaintiffs allege defendant excavated and removed from said mining claim was of any value whatever, or that plaintiffs have been damaged by the entry into or upon said mining claim by defendant, or by the excavation or removal of any ore therefrom, or by the conversion of any ore excavated or removed therefrom by the defendant, in any sum whatever.

And for a further defense defendant admits that plaintiffs are the owners of all that portion of the Colorado mining claim described in their complaint, except that portion hereinafter described. And for a further defense defendant al-

leges that on the —— day of ———, 1875, it was the owner of, in the possession of, and entitled to the possession of, a certain tunnel situated upon the public mineral lands of the United States, on and under the western slope of Prospect Mountain, in Eureka mining district, Eureka County, and State of Nevada, run for the purpose of developing veins and lodes of rock bearing valuable mineral, and for the discovery of mines, and to 1,500 linear feet of all veins or lodes within 3,000 feet from the face of said tunnel, discovered in said tunnel, on the line thereof, not discovered previously to the commencement of said tunnel, on the —— day of ———, 1875; and said defendant ever since said date has been, and now is, the owner of, in the possession of, and entitled to the possession of, said tunnel, and of all the veins and lodes discovered within 3,000 feet of the face of said tunnel, discovered in said tunnel, not discovered previously to the commencement of said tunnel, to the extent of 1,500 feet; that said tunnel, in its course, enters into and under and crosses the said Colorado mining claim; and one of said veins or lodes, discovered in said tunnel on the line thereof, about 1,850 feet from the face thereof, having its top or apex outside of the exterior limits of said Colorado mining claim, on its course downwards, dips under and through said Colorado mining claim, and certain excavations made upon said vein or lode last above described are under and within the surface limits of said Colorado mining claim, extended downward, vertically.

And defendant denies that plaintiffs are the owners of, or in the possession of, or entitled to the possession of, said tunnel, or any portion thereof, or of said vein, or any portion thereof, or of the excavations thereon, or of any portion thereof. The answer then sets up five years' "quiet, peaceable, actual and exclusive possession of all of said tunnel, and of said vein or lode, and of the excavations thereon, above described," by the defendant, and follows with denials of the equitable cause of action.

The evidence shows that the Colorado had been worked downward from the surface a distance of about 166 feet. The ledge in controversy was struck in defendant's tunnel 900 feet below the surface, and had been worked upward a distance of 394 feet. The two workings were separated by between 300 and 400 feet of unexplored ground.

At the plaintiffs' request, the court gave the following instructions: "No. 2. It is admitted by the pleadings that the plaintiffs were, when the alleged wrongs were committed, and now are, the owners in fee and in possession of the Colorado mine. It is also admitted that the defendant entered beneath the surface of said Colorado mine, and extracted ore from a lode, and converted the ore to its use, which lode, at the point of entry, is within the boundary lines of said Colorado mine, extended vertically downward. These admissions are conclusive upon the defendant." "No. 4. A vein, lode, ledge, or deposit, within the meaning of the law, is a crack, cavity, or fissure in the earth crust, filled with rock in place, bearing gold, silver, or other valuable mineral. The mineral or rock containing the mineral must be in place; that is to say, in the place where it was originally formed or deposited. Loose, broken rock, or wash, sand or gravel, float or soil, is not sufficient. The rock containing the mineral must be in place between walls or defined boundaries. The rock must also contain valuable mineral." "No. 9. * * * You are instructed that, under the admission and averments of defendant, the burden of proof rests upon the Prospect Mountain Tunnel Company to prove to you that the lode or deposit so admitted to be within the limits of the Colorado mine has its top or apex outside of the exterior lines of the Colorado mine, extended vertically downward."

Defendant's instruction No. 3, refused, was as follows: "The court instructs the jury that in order to entitle plaintiffs to recover they must show, by a preponderance of evidence, that they were the owners of the lode, vein, or ore body out of

which the ore in controversy was taken, at the time it was taken; and, to do this, it was necessary for them to establish by a preponderance of evidence that the top or apex of said lode was within the exterior limits of the Colorado mining claim, extended downward vertically; and if they have failed to do this the jury should find a verdict in favor of the defendant, the Prospect Mountain Tunnel Company."

The jury found a verdict in favor of the plaintiffs for $5,000, for which amount judgment was entered in their favor, and an injunction granted, restraining the defendant from entering upon the Colorado. The injunction was subsequently modified so as to exclude the tunnel from its operation.

THOMAS WREN, for appellant.

ROBT. M. CLARKE and R. M. BEATTY, for respondents.

BIGELOW, J., (*after stating the facts*). One of the leading questions involved in this case is whether the answer admits the plaintiffs' ownership of the Colorado mining claim. In their complaint the plaintiffs allege that they are the owners and in the possession of that certain mine and mining location and premises known as, and called, the "Colorado Mine." This the evidence shows to be a parallelogram 1,000 feet in length by 200 feet in width, and we shall construe the complaint as amounting to an allegation that they also own all beneath the surface of such parallelogram, as the same may be extended downward indefinitely.

In answer to this the defendant admits the plaintiffs' ownership of the Colorado mining claim, as described in the complaint, "except that portion hereinafter described." It then alleges that the defendant is the owner of a certain tunnel, and "that said tunnel, in its course, enters into and under and crosses the said Colorado mining claim, and one of said veins or lodes, discovered in said tunnel, on the line thereof, about

1,850 feet from the face thereof, having its top or apex outside of the exterior limits of said Colorado mining claim, on its course downwards, dips under and through said Colorado mining claim, and certain excavations made upon said vein or lode last described are under and within the surface limits of said Colorado mining claim extended downward vertically. And defendants deny that plaintiffs are the owners of, or in the possession of, or entitled to the possession of, said tunnel, or any portion thereof, or of said vein, or any portion thereof, or of the excavations thereon, or of any portion thereof." The defendant then attempts to plead ownership of the portion above described, by virtue of five years' peaceable adverse possession.

That this is a square and explicit denial of the plaintiffs' ownership of the portion of the Colorado referred to is too clear for argument or question. If it is not, it may be safely said that no language can be used that will constitute a denial of the ownership of a portion of a mine, while at the same time admitting ownership of some other portion. It seems to us that the only way in which a contrary construction can be placed upon the answer is by absolutely shutting one's eyes to the language above quoted, and therefore we shall not pursue it further.

It may be remarked, too, that at the opening of the trial the plaintiffs did not see fit to rely upon what they now claim to have been the very serious admission of the answer, but introduced evidence to establish their title—a proceeding altogether unnecessary, if title was admitted—and whereby the plaintiffs waived all objection to the sufficiency of the denials. *Tynan* v. *Walker*, 35 Cal. 645. Under these circumstances, it was error for the court to instruct the jury, as it did repeatedly, both in the plaintiffs' instructions and its own, that the plaintiffs' ownership of the Colorado was admitted.

It is argued, however, that the proofs established the plaintiffs' ownership of the Colorado; that this ownership was not

contested upon the trial, and that consequently the error, if such it were, was harmless to the defendant. At the opening of the trial the plaintiffs introduced in evidence a patent from the United States for the Colorado mine, which was in no manner attacked by the defendant, and it is claimed that this so indubitably established the plaintiffs' title as to be equivalent to an admission of ownership in the pleadings. To properly understand this contention, it is necessary to add that the plaintiffs' theory of the issues in the case, which seems to have been adopted by the court below, is that the answer had admitted the plaintiffs' ownership of the Colorado, but set up an independent fact, to wit, that the ledge in controversy apexed outside of the plaintiffs' ground, which, if established, would rebut the effects of that admission, and constitute a defense, but that as to this fact the burden of proof was upon the defendant. Having concluded that the basis of this theory—the supposed admission—is untrue, we shall not pause to consider it, further than to determine whether the proof of a patent to the mine would throw upon the defendant the burden of proving that the ledge in controversy apexed outside the boundaries of the patented ground, which the court instructed the jury was the effect of the supposed admission. If it would not, then, even to this extent, it was not equivalent to such an admission.

A patent for a mining claim is quite a different thing from a patent for agricultural land. The latter conveys the surface of the ground, and all that lies beneath it. *Amador Co.* v. *South Spring Co.* 13 Sawy. 523; 36 Fed. Rep. 668. The former does not necessarily do so. The patent in this case, which seems to be drawn in accordance with the statutes, expressly provides that it is "subject, nevertheless, to the following conditions and stipulations. *First*, that the grant hereby made is restricted to the land hereinbefore described as 'Lot No. 79, with one thousand linear feet of the Colorado mine, vein, lode, ledge, or deposit, for the length aforesaid

throughout its entire depth, as aforesaid, together with all other veins, lodes, ledges, or deposits throughout their entire depth, as aforesaid, the tops or apexes of which lie inside the exterior lines of said survey." It follows that ledges which apex outside the boundaries of the land conveyed do not belong to the patentees. *Montana Co.* v. *Clark*, 42 Fed. Rep. 626; *Mining Co.* v. *Cheesman*, 116 U. S. 533; 6 Sup. Ct. Rep. 481; *Reynolds* v. *Mining Co.* 116 U. S. 687; 6 Sup. Ct. Rep. 601; *Iron Silver Co.* v. *Mike & Starr Co.* 143 U. S. 394; 12 Sup. Ct. Rep. 543.

Doubtless, the production of a patent to the ground in which the ledge is found makes out a *prima facie* case for the plaintiffs; that is, in the absence of any evidence tending to prove that the ledge apexes outside the exterior lines of the plaintiffs' patented ground, it would be presumed to apex inside those lines. *Mining Co.* v. *Campbell* 17 Colo. 207; 29 Pac. 513; *Cheesman* v. *Shreve*, 37 Fed. Rep. 36. But, when evidence is produced tending to show that the ledge apexes outside those lines, this simply tends to prove that the plaintiffs, notwithstanding their patent, do not own that ledge; and they must now meet this evidence, and overcome it, or they will fail in establishing their title. As the plaintiffs' ownership is denied, the burden of proving it is all along upon them. If the ownership depends upon whether the ledge apexes inside the exterior lines of the mine, then this fact, the same as any other fact upon which title depends, must be established by the party asserting it. The plaintiffs must recover upon the strength of their own title. If they do not own the ledge from which the ore was extracted, it matters not who does own it. *Reynolds* v. *Mining Co. supra.* Evidence showing that the ledge apexes outside the plaintiffs' ground is not offered to establish a fact by way of confession and avoidance of the plaintiffs' case, as to which the burden would be upon the defendant, but to show that they never had any case, because they never owned that ledge. The

burden of showing ownership being placed by the pleadings upon the plaintiffs, it never shifts to the defendant, except in the limited sense already spoken of. This is a universal rule, applicable to all cases, and one that is supported by both reason and the great weight of authority. The distinction between the two burdens is clearly pointed out in *Scott* v. *Wood*, where it is said: "The term 'burden of proof' is used in different senses. Sometimes it is used to signify the burden of making or meeting a *prima facie* case, and sometimes the burden of producing a preponderance of evidence. * * * The two burdens are distinct things. One may shift back and forth with the ebb and flow of the testimony. The other remains with the party upon whom it is cast by the pleadings; that is to say, with the party who has the affirmative of the issue." 81 Cal. 398, 400; 22 Pac. Rep. 871.

In *Heinemann* v. *Heard*, the Court of Appeals of New York said: "During the progress of a trial it often happens that a party gives evidence tending to establish his allegation, sufficient, it may be, to establish it *prima facie;* and it is sometimes said the burden of proof is then shifted. All that is meant by this is that there is a necessity of evidence to answer the *prima facie* case, or it will prevail; but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and this burden remains throughout the trial." 62 N. Y. 448, 455.

In *Heilman* v. *Lazarus* it was again said: "The issue as to which the burden of proof was on the plaintiff was that of title, of right of possession of the land, and that burden remained with him to the end." 90 N. Y. 672, 673.

In *Clark* v. *Hills*, an instructive case, the court uses this language: "Much less does the fact that a defendant is forced to maintain the affirmative of some fact, in disproving the plaintiffs' case, shift upon him the burden of proof. Hence the *onus probandi* in this case was not affected by the fact

that, in showing the land to have been vacant at the date of the plaintiffs' location, he had to prove that it was not within the lines of the Ponce grant, and that the defendant met the issue by proof that it was embraced within the lines of that grant. That a party does not shift to his adversary the burden of proof by making out a *prima facie* case is clear, from what we have said, and is a well-settled principle. His case must be disproved. But, when proof having this tendency is produced, it then becomes a question whether upon the whole evidence the *prima facie* case has been successfully met by the adverse party. If it appears that the preponderance of testimony is not in favor of the party having the *onus*, the verdict should be against him. If the testimony is evenly balanced, he has failed to establish the issue, but has left it doubtful whether he has sustained it or not, and that doubt must inure to the benefit of his adversary." 67 Tex. 141, 149; 2 S. W. Rep. 356, and so are other cases. *Lamb* v. *Railroad Co.* 46 N. Y. 271; *Blunt* v. *Barrett*, 124 N. Y. 119; 26 N. E. Rep. 318; *Claflin* v. *Meyer*, 75 N. Y. 260; *Willett* v. *Rich*, 142 Mass. 357; 7 N. E. Rep. 776; *Nichols* v. *Munsel*, 115 Mass. 567; *Wilder* v. *Cowles*, 100 Mass. 490; *Tarbox* v. *Steamboat Co.* 50 Me. 345; *Small* v. *Clewley*, 62 Me. 157; *Insurance Co.* v. *Schwing*, 87 Ky. 410; 9 S. W. Rep. 242; *Powers* v. *Russell*, 13 Pick. 76; *Shephardson* v. *Perkins*, 60 N. H. 77; *Blodgett* v. *Cummings*, *Id.* 116; *Wall* v. *Hill's Heirs*, 1 B. Mon. 290; *Atkinson* v. *Transportation Co.* 69 Wis. 5; 31 N. W. Rep. 164; *Bank* v. *Seymour*, 64 Mich. 72; 31 N. W. Rep. 140; *Bank* v. *Doyle*, 9 R. I. 78; *Blanchard* v. *Young*, 11 Cush. 345.

We have been cited to the case of *Bell* v. *Skillicorn*, (N. M.) 28 Pac. Rep. 768, as sustaining a contrary view; but, with all due respect to the court rendering that decision, we must decline to follow it. It is in conflict with the almost unanimous conclusions of other courts, and, in our judgment, is not supported by any of the authorities there cited, except the case of *Cheesman* v. *Hart*, 42 Fed. Rep. 98, decided by a single

judge. If we were permitted to make the suggestion, we would say that the error in *Bell* v. *Skillicorn* arises from assuming that the issue in the case was upon the defendant's ownership, whereas, as we have endeavored to show, it is entirely immaterial whether the defendant has any title whatever, if the ledge does not belong to the plaintiff, and that it does not belong to him, unless it apexes inside his boundaries.

We are therefore of the opinion that the instructions that the defendant had admitted the plaintiffs' title to the Colorado were not only erroneous, but prejudicial to the defense.

It follows, also, from what has been said, that the ruling that the burden of proving that the ledge apexed outside of the plaintiffs' boundaries was upon the defendant was also error. As here used, the phrase "burden of proof" meant the preponderance of the evidence, and must have been so understood by the jury, and in that sense it was erroneous. Upon this point defendants' instruction No. 3 stated the law correctly, and should have been given.

The jury were also instructed that the answer admitted that the ore extracted and in question had been taken by the defendant from a lode which at the point of entry was within the exterior lines of the Colorado. It is perhaps sufficient to say that the answer contains no admission that the defendant had extracted or taken ore from any place whatever, "nor that the point of entry" to the lode, whatever that may mean, was within the plaintiffs' boundaries.

We are also of the opinion that the definition of what constitutes a lode was erroneous, and while in many cases the error might be harmless, it was, under the circumstances existing here, prejudicial to the defendant. A certain formation, which the defendant claimed to be the ledge, had been traced upward outside the plaintiffs' boundaries, and a large amount of work there done upon it. If this was the ledge, as the defendant claimed, it tended to show that its apex was outside those boundaries. According to the

witnesses, it consisted of broken limestone, boulders, low-grade ore, gravel, and sand, which appeared to have been subjected to the action of water. This was found at a depth of several hundred feet, and where there seems to have been no question that it was within the original and unbroken mass of the mountain. So far as was shown, the rock on either side was fixed, solid and immovable. Mineral matter so situated, no matter where it was originally formed or deposited, is "in place," within the meaning of the law. The manner in which mineral was deposited in the places where it is found is, at the best, but little more than a matter of mere speculation; and to attempt to draw a distinction based upon the mode or manner or time of its deposit would be utterly impracticable and useless. The question was long ago settled by the courts. In *Stevens* v. *Williams*, 1 Morr. Min. R. 557, HALLETT, J., said: "And, when this act speaks of veins or lodes in place, it means such as lie in a fixed position in the general mass of country rock, or in the general mass of the mountain. As distinguished from the country rock, this superficial deposit may have been brought into its present position by the elements, may have been washed down from above, or may have come there as alluvium or diluvium, from a considerable distance. Now, whenever we find a vein or lode in this general mass of country rock, we may be permitted to say that it is in place, as distinguished from the superficial deposit, and that is true whatever the character of the deposit may be. * * * It is in place if it is held in the embrace, is inclosed by the general mass, of the country."

Upon the second trial of the same case, (*Id.* 569; 1 McCrary 480), Justice MILLER said: "And there I want to say that by 'rock in place,' I do not mean merely hard rock, merely quartz rock, but any combination of rock, broken up, mixed up with minerals and other things, is rock, within the meaning of the statute." And again, in *Mining Co.* v. *Cheesman*, 116 U. S. 529, 537; 6 Sup. Ct. Rep. 481, the court said: "Excluding the

waste, slide, or *debris* on the surface of the mountain, all things in the mass of the mountain are in place." See, also, the same case in the Circuit Court, 2 McCrary, 191; 8 Fed. Rep. 297; *Hyman* v. *Wheeler*, 29 Fed. Rep. 353; *Cheesman* v. *Shreeve*, 40 Fed. Rep. 787.

Other errors have been assigned upon the instructions, and in some respects they are open to the criticisms, but as they are concerning matters that will, in the light of this decision, be readily perceived and corrected upon another trial, we do not notice them further.

The ruling striking out Mr. Wren's testimony seems to have been correct, but the notice of the tunnel location was admissible in evidence for one purpose, at least. The defendant claimed ownership of the tunnel by virtue of adverse possession. Possession alone for the term of the statute is not sufficient to divest the title of the true owner. It must be possession under claim of a title in hostility to that owner. *McDonald* v. *Fox*, 20 Nev. 364; 22 Pac. Rep. 234. This claim of exclusive and hostile ownership the notice tended to establish, without regard to whether it was sufficient under the mining statutes; and it should therefore have been admitted.

Judgment and order refusing a new trial reversed, and cause remanded.

MURPHY, J., concurs.

VENTURE OIL CO. ET AL. v. A. E. FRETTS ET AL.

(152 Pennsylvania 451; 25 Atl. 732. Supreme Court. Jan. 16, 1893.)

[1]**Lessee no title till oil found.** A vested title cannot ordinarily be lost by abandonment in a less time than that fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. A lease of a right to mine for oil, etc., stands on different ground. The title is inchoate and for purposes of exploration only until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract.

Quitting all work is abandonment. An oil lease contained a grant of a right to mine for and remove oil for a fixed period of twenty years, at a royalty of one eighth of the oil so mined and removed. *Held*, that the right of the lessee was to explore for, and determine the existence of oil under the land, and if none was found, his right ceased when the explorations were finished and the lot abandoned.

Appeal from Court of Common Pleas, Washington County.

Action in ejectment by the Venture Oil Company and C. D. Robbins against A. E. Fretts and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

JOHN W. and A. DONNAN, A. M. TODD, and JOHN M. BRADEN, for appellants.

CHARLES MCCANDLESS, DAVID STERRETT, TAYLOR & MCILVAINE, and H. M. DOUGAN, for appellees.

WILLIAMS, J. This appeal presents a somewhat novel state of facts. The evidence shows that in 1883, C. D. Robbins, then a well known and experienced oil operator, pro-

[1] *McNish* v. *Stone*, 17 M. R. 22.
Lawson v. *Kirchner*, 50 W. Va. 344; 40 S. E. 344.
Calhoon v. *Neely*, 201 Pa. 97; 50 Atl. 967.
Steelsmith v. *Gartlan*, 45 W. Va. 27; 29 S. E. 978.

cured leases upon a body of farms in Cecil township, Washington County, aggregating about fifteen hundred acres.

The territory covered by these leases was at that time wholly undeveloped, and the object of the several lessors as well as of the lessee was to ascertain by the actual use of the drill whether it was underlaid with oil. One of these leases was obtained from J. M. Gamble, whose farm included one hundred and eighty-two acres; and this is the lease out of which the controversy in this case arises. The object of the lease is stated to be the "mining and excavating for petroleum or carbon oil, gas, or other valuable mineral or volatile substances, "and it provided the operations should be begun on some one of the farms covered by the leases held by Robbins in that township within six months from the date of the lease. In case oil should be found in paying quantities on any one of the farms, operations were to be begun on the farm next adjoining within sixty days thereafter, and continued at the same rate "until all lands leased in this township are tested to success or abandonment."

Within six months Robbins began operations on the farm of J. L. Scott and drilled a well upon it to the depth of two thousand two hundred and forty-seven feet. Neither oil nor gas was found. This seems to have been regarded by all parties a sufficient depth to test the farm, and it is evident that Robbins thought it a test of the value of the region, and concluded that the territory covered by his leases was worthless as oil territory. He accordingly drew the casing soon after the well was finished and then plugged the well and abandoned it. When asked upon the witness stand why he abandoned the well he replied: "Because it was no good." He made no further effort to test any part of the land covered by his leases, but removed his machinery and drilling tools to other localities in which he prosecuted his business as an explorer for, and a producer of oil. This was in the fall of 1884. Some six or seven years later, nothing further having been done by

Robbins on any one of the farms covered by his leases of 1883, Gamble made a new lease of his farm to other parties, under whom the defendants claim title, and operations were at once begun on the land.

Robbins and the Venture Oil Company, holding under him, then brought this action of ejectment to the February term, 1892, asserting a right of entry under the lease of 1883. The case depends, therefore, on the construction of that lease and the rights acquired by Robbins under it.

The contract does not purport to be a sale of all the oil under the farm of J. M. Gamble, but a grant of the right to mine for and remove oil for a fixed period, twenty years, at a royalty of one-eighth of the oil so mined and removed. The right of the lessee or grantee under its provisions was to explore for, and determine the existence of oil or gas under the farm. If none was found, the rights of the grantee ceased when the explorations were finished. If oil or gas was found in paying quantity, then the contract took effect as an oil lease, and the lessee had a right, and was under a contract obligation, to operate the land for the production of oil during the time and upon the terms fixed in the lease. When he entered upon the Scott farm and began to drill, he commenced the search for oil or gas that he contracted to make with Gamble. It was then his duty to continue the search with reasonable diligence until he had prosecuted it "to success or abandonment" as to each farm to which his contract related. If the search on the Scott farm had been successful, the manner in which it should be prosecuted upon the others was provided for in the contract. If it was a failure, then the contract was silent as to what should be done. It had been left to Robbins to determine whether another well should be drilled or not. If he was satisfied with the test made, he had a right to abandon the leases. He was bound to test each farm to "success or abandonment," so as to operate the territory, or let go his hold upon it; but he was not bound to drill

upon each farm if satisfied by the result of the first well that the territory was not productive. He could abandon whenever he was satisfied from the search made that the further expenditure of time and money upon any given farm, or upon the body of farms covered by his leases, would be fruitless. Whenever he did so abandon a given farm, or the whole body of leased farms to which his contract referred, his rights therein were at an end. *Duffield* v. *Hue*, 129 Pa. St. 94; 18 Atl. Rep. 566; [1]*McNish* v. *Stone*, a case not yet in the reports. Upon this view of the leases of 1883 the recitals in the deeds in the line of the defendants' title are without significance. They were notice of no greater interest than Robbins actually had by virtue of the leases referred to. If the defendant had made the fullest inquiry as to the provisions of the leases, and the extent of the search made by Robbins on the land, it could have resulted in the discovery of no more than the evidence in this case discloses, viz. a discontinuance of the search in 1884, and an abandonment of the Gamble lease, with the others, as unproductive and worthless. With these facts before them, they would have been fully justified in concluding that after seven years no title in Robbins survived, and that a lease from Gamble would confer upon them an unquestionable right to enter upon and operate the land. Cases like *Kemble Co.* v. *Scott*, 90 Pa. St. 332, have little or no resemblance to the case before us. A vested title cannot ordinarily be lost by abandonment in a less time than that fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. An oil lease stands on quite different ground. The title is inchoate, and for purposes of exploration only, until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right, and the

[1]17 M. R. 22.

lessee will be protected in exercising it in accordance with the terms and conditions of his contract. This view of the lease of the Gamble farm to Robbins in 1883 is conclusive upon the plaintiffs' title, and renders the consideration of the other questions raised unnecessary.

Judgment affirmed.

MICHAEL CRONIN ET AL. v. BEAR CREEK GOLD MINING CO.

(32 Pac. 204. Supreme Court of Idaho. February 10, 1893.)

[1]**Averments as to being within statutory periods.** The complaint supporting an adverse claim should show that the claim was filed within the sixty days of publication and the suit brought within the thirty days prescribed.

Description in complaint. It must also contain such a description of the property as will enable the court to determine to what extent, if at all, the claim of the plaintiff is covered by the claim of the defendant, upon which patent is applied for.

Appeal from District Court, Elmore County; CHARLES O. STOCKSLAGER, Judge.

Action by Michael Cronin and Thomas Finnigan against The Bear Creek Gold Mining Company to determine an adverse claim to mining ground. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

The other facts fully appear in the following statement by MORGAN, J.

This is an action to quiet title, or more properly, to determine an adverse claim to mining ground. It appears from the notice offered in evidence that the location of

[1]The court will not inquire into the regularity of the adverse claim. *Hoffman* v. *Beecher*, 17 M. R. 503. In *Altoona Co.* v. *Integral Co.* 114 Cal. 100, it is held that the court takes no notice of anything in the Land Office. The current of authority is that if the complaint does not show such dates or facts as connect the two proceedings, the defense must specially plead the want of them. See notes to *Altoona Co. case, supra*, 18 M. R. 410. Mining Rights, 11th Ed. 315.

what is alleged to be the claim in controversy was made September 13, 1889, named in the notice of location the "Reeser Mine." That said location was made in the names of Pasco Veatz, Jake Reeser, James Fleming, and three others. What is termed an "amended location" of the same claim was made January 29, 1891, by Michael Cronin and Thomas Finnigan and Jacob Reeser. That these plaintiffs now hold and own all rights that may have been acquired by these locators by virtue of said location. The same ground substantially is claimed by the defendant, by virtue of a location made on or about the 20th day of February, 1877. The defendant claimed to be in possession, and the owner thereof, as against all persons except the United States. In November, 1890, the defendant made an application for a patent in the United States land office at Hailey, Idaho, that being the district in which the said claim is situated. Notice thereof was duly published for a period of 60 days as required by the United States statutes. That within said 60 days the plaintiffs filed in said land office an adverse claim to the defendant's application for patent, and, within 30 days thereafter, commenced this suit, to determine the respective rights of the parties to such mining claim. The complaint is substantially one to quiet title, and simply alleges ownership and possession of the claim, describing it; that defendant claims an interest therein adverse to the plaintiffs; that such claim is without right; and that defendant has no right or title thereto—and prays that plaintiffs may be adjudged the owners thereof, etc.

The defendant, in its answer, denies plaintiffs' title, and asserts title and possession and right to possession by means of a prior location; and, for a second defense, sets up the statute of limitations. Plaintiffs introduced in evidence their notice of location, which was rejected by the court, and an exception taken. They then offered in evidence the amended notice of location, which was also rejected, and an exception

taken. No further evidence on the part of the plaintiffs being offered, the defendant moved for a nonsuit on the ground of the failure of plaintiffs to prove a valid location. This motion was allowed and an exception taken. Motion for a new trial was made and overruled and an appeal was taken to this court.

WYMAN & WYMAN, for appellants.

R. Z. JOHNSON, for respondent.

MORGAN, J. (After stating facts.) An objection is made to the form of the complaint by the defendant for the reason that it contains no allegation that would indicate that the suit was brought to determine an adverse claim. There is no allegation that the claim was located by the plaintiffs or their grantors; nor is there any allegation that the defendant had made application for patent, nor that the plaintiffs had filed an adverse claim in the land office to contest the right of the defendant to such patent; nor is there any sufficient allegation defining just what land is claimed by the plaintiffs, nor how much of said land is claimed by defendant.

The case of *Mattingly* v. *Lewisohn* (Mont.) 19 Pac. 310, was an action of a similar character in which the court says: "The fact of filing an adverse claim within the statutory time, and the institution of the suit within the time limited by law, must doubtless be conclusively established by proof to enable the adverse claimant to recover. If these facts are necessary in proof, are they not also necessary as allegations? Is the complaint in this case sufficient without them? We think not; and, on the familiar principle that allegations and proofs should correspond, one is futile without the other."

A complaint in an action, under the Revised Statutes of the United States (section 2326) to contest an application for a patent for mining land, which fails to show that plaintiff has filed his adverse claim within the period prescribed by section

2325, and brought the action within the time thereafter allowed by section 2326, is defective. See, also, *Anthony* v. *Jillson* (Cal.) 23 Pac. 420. In this case the court says: "We think that the pleading of both plaintiff and defendant should set forth the facts upon which they rely. This is a rule in reference to the pleadings in actions to determine the right to purchase other public lands." In *Woods* v. *Sawtelle*, 46 Cal. 389, RHODES, J., said:

"When action is brought to determine which of the parties has the better right to make the purchase, it becomes necessary for each party to state directly all the facts upon which he relies to show that his is the better right." In *Cadierque* v. *Duran*, 49 Cal. 356, the same learned justice, speaking for the court, said: "Each party must state in his pleadings all the facts upon which he relies as showing his right to become the purchaser; all the steps he has taken to avail himself of and secure his right to make the purchase,—applies to the answer as well as the complaint." In this case, however, there was no demurrer filed to the amended complaint, probably for the reason that the complaint is sufficient in an action to quiet title, and having no reference to a contest between parties seeking to obtain a patent from the United States under sections 2325 and 2326 of the Revised Statutes of the United States.

In the bill of exceptions, which appears as a part of the record in this case, is the following stipulation: "Michael Cronin *et al.*, plaintiffs, *vs.* The Bear Creek Gold Mining Co., defendant. It is stipulated and agreed by and between plaintiffs and defendant that plaintiffs now have and own by mesne conveyances all the rights acquired by William Richan, A. D. Craig, Michael Cronin, Pasco Veazt, Jacob Reeser, James Fleming, by and under their notice of location of the Reeser lode, dated September 13, 1889; and the defendant now has and owns by mesne conveyances all the rights acquired by S. B. Dilley by and under his notice of location of the Dun-

can lode claim, dated in January, 1879; and that said plaintiffs filed in the proper land office at Hailey, in this state, an adverse claim to the defendants' application for patent for said Duncan lode claim, within the sixty days' publication of notice of said application, which adverse claim is founded upon and sets forth said notice of September 13, 1889, as the source of plaintiffs' title. That plaintiffs' action was commenced within thirty days after the filing of said adverse claim; and that the plaintiffs are citizens of the United States; and that the above-named locators, under which plaintiffs claim, are, and S. B. Dilley is, a citizen of the United States, and were such at the time of their respective locations. (Signed) R. Z. Johnson, Attorney for Defendant. Cahalan & Badger, Attorneys for Plaintiff." Indorsed as follows, to wit: "In the District Court of Elmore County, Michael Cronin *et al. v.* The Bear C. M. Co. Filed November 3, 1891. A stipulation."

This stipulation, together with the pleadings in the case, shows that this was an action brought in accordance with section 2326 of the Revised Statutes of the United States, in support of the adverse claim to the mining land in question, and to determine the right to the possession thereof. To sustain such suit, it is necessary to prove that the adverse claim was filed in the land office within 60 days of the publication of the notice of application for patent, and also that said suit was brought in support of such adverse claim within 30 days of the filing of the same. If necessary to prove these facts, it is also necessary to allege them in the complaint. The complaint contains no such allegations, and is fatally defective in this respect. The complaint does not show wherein the location alleged to have been made by the defendant conflicts with that made by the plaintiffs, or whether it conflicts at all. The judgment must follow the complaint. It would be impossible to construct a judgment in this case which would determine the right of the plaintiffs to the min-

ing claim in controversy, or which would sufficiently inform the officers in the land office that the land described in the application for patent was owned by the plaintiffs, without going outside of the complaint, to the proofs or maps or charts, to identify the claim in such manner as to make it sufficiently certain. The complaint, therefore, is not only insufficient to permit proofs to be introduced, but is also insufficient to support a proper judgment in this case, and nonsuit was properly allowed. *Mattingly* v. *Lewisohn, supra; Lalande* v. *McDonald* (Idaho), 13 Pac. 347. Defective allegations in the complaint are sometimes cured by the answer but the entire absence of a material allegation is not supplied by the answer. Neither does the stipulation cure defects in the complaint. The complaint being insufficient to support the judgment, it is unnecessary to go further in this case. *The judgment of the court below must be affirmed, and it is so ordered. Costs awarded to defendant.*

HUSTON, C. J. and SULLIVAN, J., concur.

JOHNSTON v. STANDARD MINING CO.

(148 U. S. 360; 13 Sup. Ct. Rep. 585. Supreme Court. March 27, 1893.)

The mere institution of a suit does not, of itself, relieve a person from the charge of laches, and if he fail to prosecute it with diligence the consequences are the same as if it had never been instituted.

Plaintiff should make enquiry. Where laches is in issue the plaintiff is chargeable with such knowledge as he could have obtained upon enquiry when the facts were such as to put upon enquiry a person of ordinary intelligence.

[1]**Where the property is of fluctuating value** the duty to enquire is the more peremptory.

Cestui que trust consenting to form corporation. A claimant of an interest in a mining claim, of which the legal title is held by another under contract to convey to the claimant in a certain contingency, waives his right to a conveyance if he consents to the formation of a corporation to take and develop the property.

Facts of the case prove laches. In 1880 plaintiff conveyed a quarter interest in a mining claim, the vendee agreeing to bring suit to clear the title and reconvey a one eighth interest. The vendee settled the title by a compromise and conveyed the property to a corporation of which facts plaintiff had notice or knowledge sufficient to put him on enquiry. In 1884 the claim was patented to the corporation or its successor, of which plaintiff obtained knowledge in February, 1885. In 1885 and 1886 plaintiff began suits, neither suit being diligently prosecuted and both of them dismissed. In 1887 the present suit was filed. In the meantime the property had increased in value from a few thousand to several million dollars, and the stock had come into the hands of persons ignorant of plaintiff's claim. *Held*, that plaintiff was guilty of laches barring the case.

Appeal from the Circuit Court of the United States for the District of Colorado. Affirmed.

[1]*Curtis* v. *Lakin*, 94 Fed. 251; 19 M. R.—. *Pratt* v. *California Co.* 24 Fed. 869.

Equity does not favor the purchase of stale demands. *Porter* v. *Noyes*, 47 Mich. 55; 10 N. W. 77.

Lapse of time does not count as laches where during a long portion of it the parties were endeavoring to compromise and only a short time elapsed since the right was denied and suit became necessary. *Compo* v. *Jackson Iron Co.* 49 Mich. 39; 12 N. W. 901.

This was a bill in equity to establish the ownership of the plaintiff in one fourth of a mining claim known as the "J. C. Johnston Lode," and for a decree that the defendant be required to execute a deed of the same, and to account to plaintiff for one fourth of the net proceeds of the mine. The bill, which was originally filed in the state court against the Standard Mining Company, Isaac W. Chatfield, and other defendants, was subsequently removed to the Circuit Court of the United States, upon the petition of the Standard Mining Company, as a suit involving a separate controversy between itself and the plaintiff, Johnston.

The bill averred, in substance, that on September 14, 1880, plaintiff, being then the owner and in possession of an undivided half of the J. C. Johnston lode mining claim, situated in the Roaring Fork mining district, Pitkin County, Colo., executed a certain title bond, whereby he agreed to sell and convey to the defendant Chatfield an undivided one-fourth interest in such mining claim, with other property, for a

Bars accounting on prospecting contract. *West* v. *Russell*, 74 Cal. 544; 16 Pac. 392.

Foundations of the law of laches stated. *Gilmer* v. *Morris*, 80 Ala. 78; 60 Am. Rep. 85.

Knowledge that the mine had appreciated is nothing, if the defendant did not know until just before suit that he had been cheated. *Bowman* v. *Patrick*, 36 Fed. 139; Rev'd on other points. 149 U. S. 411.

No time runs as long as fraud undiscovered. *Kelley* v. *Boettcher*, 85 Fed. 55.

Unpatented mining property is a strong instance of fluctuating value, invoking the doctrine of laches. *Great West Co.* v. *Woodmas Co*, 14 Colo. 90; 23 Pac. 908.

Delay alone, conditions not being altered, is not laches. *Farris* v. *Wirt*, 16 Colo. App.—; 63 Pac. 946.

Grantor having acquiesced for 12 years is not entitled to enjoin the removal of costly improvements. *Potter* v. *Rend*, 201 Pa. 318; 50 Atl. 821.

Laches cannot be invoked by the party out of possession against the party in possession in specific performance case. *Coffee* v. *Emigh*, 15 Colo. 184; 25 Pac. 83.

consideration of $1,200; that on October 12, 1880, plaintiff executed to Chatfield a deed of his entire interest in such mining claim for a nominal consideration of $1,200; that his interest at the time was an undivided half, and that such conveyance was in pursuance of said bond as to a one-fourth interest covered by said bond, and, as to the remaining one-fourth interest, such conveyance was in trust that Chatfield, with Charles I. Thomson and Daniel Sayre, who were his legal advisers, and who were also made defendants, would defend Johnston's title to this claim against another, known as the "Smuggler Claim No. 2," with which these parties represented to him that it was in conflict, and would perfect plaintiff's title to the J. C. Johnston claim by obtaining a patent therefor, and would thereupon convey to plaintiff an undivided one-eighth interest in the property, free and clear of all costs and expenses of the patent proceedings, and of the threatened litigation with the Smuggler No. 2 claim, and of all charges, incumbrances, and assessments, and would hold the remaining one-eighth of said title for Thomson & Sayre as compensation for their legal services, and for the costs of litigation; "but it was expressly agreed and understood that, if said services should not be necessary, and should not be performed, said Thomson & Sayre should receive nothing, and that the said remaining one eighth should be reconveyed to plaintiff."

The bill further averred that, upon the solicitation of these parties, plaintiff was induced to employ Thomson & Sayre upon these terms, and thereupon executed the deed to Chatfield of all his interest in the claim, and in pursuance of such agreement, a contract in writing was drawn up and signed by Chatfield and plaintiff, whereby the former agreed, upon perfecting the title to the claim, to convey to plaintiff an undivided one eighth free and clear of all expenses and of the proposed litigation; that plaintiff did not retain a copy of this contract, but that the same was left in the possession

of Thomson and Sayre, who promised to have the same recorded, but failed to do so.

The bill further averred that on December 14, 1880, Chatfield conveyed to the Fulton Mining Company, also made a defendant, all his interest in such claim; that such conveyance was made before the incorporation of the Fulton Mining Company, and, therefore, that it acquired no title by said conveyance; that the incorporators of said Fulton Mining Company were the defendants in this suit, including Chatfield, Thomson, and Sayre, and the same defendants were all directors of such company for the first year of its existence, and that all of them had, before such conveyance by Chatfield to the company, full knowledge and actual notice of the uses and trusts upon which Chatfield held plaintiff's title as aforesaid; that in February, 1881, the Fulton Mining Company made application for letters patent for the J. C. Johnston mining claim, and that letters patent were issued to said mining company, bearing date February 21, 1884, but that plaintiff did not learn of the issuance of said patent until February, 1885; that, upon learning of the same, plaintiff immediately made demand upon Chatfield, individually and as manager of the Fulton Mining Company, for a conveyance of his interest in the property according to plaintiff's contract with Chatfield, which demand was refused.

The bill further charged that from time to time, after the execution of his contract with Chatfield, and until he learned of the issuance of the letters patent to the Fulton Mining Company, he frequently inquired of Chatfield as to the progress that was being made to perfect the title to the J. C. Johnston claim, and that Chatfield always answered such inquiries, that the patent had not been received, but that application had been made therefor, and that everything would be all right; that he had implicit confidence in said Chatfield, and, knowing also that the issuance of United States patents for mining claims was usually attended with

long delays, plaintiff never suspected that anything was wrong until he learned of the issuance of the patent, and until his demand was refused, as aforesaid. It was further charged that no bona fide suit or proceeding was ever brought or threatened by the claimants of Smuggler No. 2 claim, as was represented by Chatfield, Thomson, and Sayre; that the only such suit ever brought by any claimants of Smuggler No. 2 was begun in the Circuit Court of the United States in May, 1881; that a demurrer to the complaint was filed on July 20, and no further proceedings were taken until December 18, 1882, when the cause was dismissed by stipulation of the parties, but that such proceedings were taken without the knowledge or consent of the plaintiff; that such suit was without foundation or merit; and that said Thomson & Sayre caused the same to be brought only that they might appear to defend the same, and thereby apparently perform the services for which they were to receive one-eighth share of said Johnston claim. Plaintiff further averred that he did not discover the fraud practiced upon him by the said Thomson & Sayre until April, 1885, when he was informed of the same by his attorney, who, at his request, investigated and reported the facts in relation thereto.

The bill further averred that the Fulton Mining Company conveyed the claim to one William J. Anderson, who was made a defendant, by deed dated July 5, 1886, for a consideration of $125,000, and that Anderson attempted to convey the same to the Standard Mining Company, now the sole defendant, by deed dated June 17, 1887, for a consideration of $2,500,000, but that all of said parties had full knowledge and actual notice of the plaintiff's interest in the property, and the trusts upon which Chatfield took title thereto, and that such conveyances were fraudulent and void as to plaintiff, and made with special intent to defraud and hinder him.

He further averred that the several defendants had mined large quantities of ore from the claim, and prayed that he

be adjudged to be the owner of one-fourth of such claim; that the defendant be decreed to execute a deed of the same to him, and be required to account to him for the proceeds of the ore; and that in case such relief could not be granted, for a personal judgment against Chatfield for the value of an undivided one-eighth of such mine, and against Thomson & Sayre for the value of another one-eighth, and for an accounting from them personally for the ores mined.

The Standard Mining Company filed its answer to this bill in the Federal Court, and upon the issue formed between the parties testimony was taken, the case heard by the District Judge, and on March 1, 1889, an interlocutory decree entered substantially in accordance with the prayer of the bill, and an accounting ordered. The defendant immediately applied for a rehearing, and the case was reheard without reference to the grounds relied upon in the petition for rehearing, which did not raise the question of laches; and the case was again taken under advisement, when the court delivered a second opinion, dismissing the bill upon the ground of laches. Thereupon plaintiff filed a petition for a rehearing upon this question, which was denied by the court without argument. Plaintiff thereupon appealed to this court.

HUGH BUTLER and GEO. S. BOUTWELL, for appellant.

CHAS. S. THOMAS, for appellee.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

The bill was dismissed in the court below upon the ground of laches, and the correctness of its ruling in that particular is the first question presented for our consideration.

The gist of the plaintiff's bill is the alleged fraud of Chatfield in failing to carry out his contract of October 12, 1880, wherein he agreed that in the event of succeeding in certain legal

proceedings to be instituted by him for vesting the legal title to the Johnston claim in the plaintiff, he would convey to plaintiff an undivided one-eighth interest in the lode, free and clear of all expenses incidental to the litigation; plaintiff, upon his part, agreeing to pay an undivided one-eighth of the expenses which should accrue in the developing and opening of the lode. The lode in question had been located on the preceding 4th of August by Johnston, as owner of one-half; Joseph W. Adair, as owner of one-fourth; and George A. Crittenden, as owner of the remaining fourth. It seems there was a conflict between this and another mining claim, known as "Smuggler No. 2," and the agreement with Chatfield was made for the purpose of contesting this claim.

It also appeared that plaintiff was one of the parties who had located the Smuggler No. 2 claim; that, early in the year 1880, plaintiff had entered into what is known as a "grub-stake" contract with one Acheson, individually and as agent and attorney in fact of Edward Dunscomb and James E. Seaver, whereby plaintiff agreed to locate mining claims on behalf of himself and these parties, in consideration of which they agreed to furnish all the supplies and pay all the expenses which should be required in prospecting, locating, and developing such mining claims; that, in pursuance of such agreement, plaintiff found indications of a silver-bearing lode on Smuggler mountain, in the Roaring Fork mining district, and on April 15, 1880, located Smuggler No. 2 mining claim upon this vein; that such location was made in the joint names of plaintiff, owner of one-fourth, and the wives of Dunscomb and Seaver, each claiming three-eighths; that after such location, and before the discovery of any vein within the limits of the Smuggler claim, the other parties abandoned such claim, failed to furnish the necessary supplies and money to the plaintiff, who continued to develop and work the ground on his own account and at his own expense; that on August 4, 1880, plaintiff discovered within the limits

of said Smuggler claim a vein or lode, and thereupon duly located the same as the J. C. Johnston lode mining claim, for the use of himself, Crittenden, and Adair, as above stated; that, upon learning of such discovery and location, Acheson, Dunscomb, and Seaver negotiated with Crittenden and Adair for the purchase of their interests in the Johnston claim, and on August 10, 1880, purchased the same for $1,000; that at the same time they negotiated with plaintiff, and agreed to purchase his one-fourth interest, but failed to do so.

Plaintiff further contended that these facts respecting the location of the two claims, and the negotiations with Acheson, Dunscomb, and Seaver, were known to Chatfield, Thomson, and Sayre, who still insisted that there were certain parties who, as grantees of Dunscomb and Seaver, claimed title under the Smuggler location adversely to plaintiff's interest in the Johnston claim, and that legal proceedings had already been, or were about to be, commenced to enforce said claims; that Chatfield, Thomson, and Sayre represented that it was desirable to perfect the title of the Johnston claim by obtaining a patent therefor, and to this end they had secured, or would secure, a conveyance from the owners of the other half of the Johnston claim. They further represented to him that, for the better management of the property, they proposed to organize a stock company, and to that end they had secured the other half interest in the Johnston claim; and that the defendants were then associated together, and had agreed to organize a stock company for that purpose, and that the Fulton Mining Company was shortly thereafter incorporated by them. These conflicting claims with regard to the ownership of the property within the limits of these two claims were evidently the foundation of the agreement of October 12, 1880, whereby Chatfield agreed to clear up the title to the property, and to convey one-eighth to the plaintiff.

Most of the testimony was directed to the relative merits

of the Smuggler No. 2 and the J. C. Johnston locations, apparently upon the assumption by the defendant that the plaintiff was bound to prove that the owners of the Johnston lode had the better title. Plaintiff, however, contends that the contract of October 12, 1880, and the other conveyances made about the same time, when read in the light of the surrounding circumstances, are conclusive evidence of the following: First, that the interest actually purchased by Chatfield in the Johnston mine was a quarter interest, and that the remaining fourth of Johnston's interest in the property, which he deeded to Chatfield, was in trust; second, that this fourth interest was the interest referred to in the contract as being claimed adversely to Chatfield by certain persons; third, that the defendants Thomson & Sayre were employed to institute the "legal proceedings" mentioned in the contract, and were to receive as a contingent fee for their services in that behalf an eighth of the Johnston mine, in case those proceedings were successful; fourth, that in such case Johnston was to receive the remaining eighth of this contested quarter; fifth, that the "legal proceedings" mentioned contemplated and included an application for letters patent, and the acquisition of the government title, as well as a suit of some kind.

Upon the basis of the fifth and last proposition above stated the plaintiff contends that it would follow that a cause of action did not accrue to him until a patent had been issued by the government, which did not take place until July, 1884, and that as the plaintiff was not informed of this fact until some time in 1885, and as he filed his first bill against Chatfield in the United States court on August 1, 1885, he insists that he fulfilled all the requirements of the law with respect to diligence, and that the defense of laches is not sustained. We think this position, however, is founded upon a somewhat strained interpretation of the contract in question. It provides that "in the event of the party of

the first part [Chatfield] prevailing and succeeding in certain legal proceedings about to be instituted and commenced by the party of the first part for the vesting of the legal title in the party of the first part, against persons who claim adversely to him an interest in the following described property, * * * that the party of the first part, upon so acquiring the title, legal and equitable, to the said mine, by means of the legal proceedings so about to be commenced, doth hereby covenant and agree to and with the said party of the second part [Johnston] to convey to the said party of the second part an undivided one-eighth interest in and to the said above-described lode, which shall be free and clear from all expense incidental to the litigation incident to said contemplated suit." A compliance with this contract on Chatfield's part evidently required the commencement within a reasonable time, and the diligent prosecution of, a suit for the establishment of his title to the property, since the question of adverse claims could not be settled by the mere application for a patent without the institution of a suit, or the compromise of these conflicting claims. That this was the construction put upon it by Chatfield himself is evident from the fact that, three days after this contract was made, he executed a quitclaim deed to Thomson & Sayre of an undivided one-eighth interest in the Johnston lode for a nominal consideration of $500. It is admitted, however, that no money consideration was paid for this conveyance, and Chatfield testifies that the actual consideration for this deed to Thomson & Sayre was the legal services which they were to perform in and about the "legal proceedings" mentioned in the contract, and he further testifies that those services were never performed. This is all that Chatfield appears to have done at this time in the performance of his contract. Whether, if suit had been begun and prosecuted to a successful termination, a bill would have lain before the patent was issued, it is not necessary to decide, since

it is clear that the failure of Chatfield to institute legal proceedings within a reasonable time was a breach of his contract, and entitled plaintiff to treat it as at an end.

There were also significant facts occurring thereafter which should have put plaintiff upon inquiry, and stimulated him to activity in asserting his rights. As he was one of the original locators, both of the Smuggler No. 2 and the Johnston claims, he must have known that, in any controversy between them, he would have been an important witness; and the very fact that he was not called upon indicated that the suit was not being prosecuted, and strengthened the inference, derivable from all the testimony, that the claim was not then considered of sufficient value to warrant the institution of a suit. That he was accessible as a witness is evident from his own testimony that he was in Thomson & Sayre's office in 1881, and was working at that time for Chatfield on a subcontract. The incorporation of the Fulton Mining Company in 1880, and the conveyance by Chatfield, Crittenden, and Adair of the entire property to the mining company by deeds put upon record, were wholly inconsistent with the spirit, if not with the letter, of the contract, and were circumstances calculated to arouse suspicion, since they divested Chatfield of his interest in the mine, disabled him from instituting legal proceedings in his own name, and put the ownership of the mine in the shape of capital stock, which was liable at any time to pass into the hands of purchasers who might be entirely ignorant of the plaintiff's interest. It is but just, however, to say in this connection that plaintiff seems to have been apprised of the fact that these parties were about to associate themselves together in forming a stock company, and that the advantages of such a corporation were urged upon him, and in his first bill he averred that it was understood that the company would convey and transfer to him stock in such company to the amount of his interest in the lode, and that Chatfield would hold his

interest in trust for the plaintiff until his title to the location had been established. If he assented to the formation of the corporation, and to the transfer of the mine to it, he clearly waived his right to reclaim an interest in the mine itself. It is also a circumstance proper to be considered, as bearing upon the equities of this defense, that at the time of the institution of this suit a large proportion, if not a majority, of the stock in this company had passed into the hands of purchasers who had not been connected with the formation of the company, and were entirely ignorant of the Johnston-Chatfield contract.

In May, 1881, plaintiff went to the office of Thomson & Sayre, in Leadville, asked how the case was, and was informed that it was compromised. He then told them he would like to take the papers and copy them. They gave them to him. He took them, and looked them over; went down to have them copied, but found it would cost too much, and did not have it done. These papers were the contracts between Chatfield and himself, Crittenden, Adair, and himself, and the original grub-stake contract between Dunscomb, Seaver, and himself. He must then have been informed of the fact that the contract of October 12, 1880, had not been recorded, although Thomson & Sayre promised him it should be. In 1882 it seems that he spoke to Chatfield, and said that he thought he ought to be entitled to his interest in the property; that they should have gone on and contested the case; to which Chatfield replied that they had found that there was "no shadow of a ghost to maintain his case." Even then he did not act.

It was not until April, 1885, more than a year after the Fulton Mining Company had obtained a patent to the property, that he made a formal demand upon Chatfield, and on August 1, 1885, filed his first bill in the Circuit Court of the United States to establish his title to a quarter interest in the lode. This suit does not seem to have been prosecuted

with much diligence, since it was allowed to linger for nearly a year, and was then dismissed, apparently, for a want of jurisdiction appearing upon the face of the bill. It has been frequently held that the mere institution of a suit does not, of itself, relieve a person from the charge of laches, and that if he fail in the diligent prosecution of the action the consequences are the same as though no action had been begun. *Hawes* v. *Orr*, 10 Bush, 437; *Erhman* v. *Kendrick*, 1 Mete. (Ky.) 146, 149; *Watson* v. *Wilson*, 2 Dana, 406; *Ferrier* v. *Buzick*, 6 Iowa, 258; *Bybee* v. *Summers*, 4 Or. 351, 361.

On the 19th of August, 1886, a second suit was brought in the state court, which, after some delay, caused in part by the death of the plaintiff's counsel, was dismissed because of a defective summons under the state practice.

While there is no direct or positive testimony that plaintiff had knowledge of what was taking place with respect to the title or development of the property, the circumstances were such as to put him upon inquiry; and the law is well settled that where the question of laches is in issue the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry. This principle was applied at the present term of this court in *Foster* v. *Railway Co.* 146 U. S. 88; 13 Sup. Ct. Rep. 28, to a case where a stockholder in a railway company sought to set aside a sale of the road which had taken place 10 years before, when the facts upon which he relied to vacate the sale were of record, and within easy reach. See, also, *Wood* v. *Carpenter*, 101 U. S. 135, 141; *Kennedy* v. *Green*, 3 Mylne & K. 699, 722; *Buckner* v. *Calcote*, 28 Miss. 432; *Cole* v. *McGlathry*, 9 Me. 131; *McKown* v. *Whitmore*, 31 Me. 448.

The duty of inquiry was all the more preemptory, in this case, from the fact that the property of itself was of uncertain character, and was liable, as is most mining property, to suddenly develop an enormous increase in value. This

is actually what took place in this case. A property which, in October, 1880, plaintiff sold to Chatfield upon the basis of $4,800 for the whole mine is charged in a bill filed October 21, 1887, to be worth $1,000,000, exclusive of its accumulated profits. Under such circumstances, where property has been developed by the courage and energy and at the expense of the defendants, courts will look with disfavor upon the claims of those who have lain idle while awaiting the results of this development, and will require, not only clear proof of fraud, but prompt assertion of plaintiff's rights. *Felix* v. *Patrick*, 145 U. S. 317, 334; 12 Sup. Ct. Rep. 862; *Hoyt* v. *Latham*, 143 U. S. 553, 567; 12 Sup. Ct. Rep. 568. *Hammond* v. *Hopkins*, 143 U. S. 224; 12 Sup. Ct. Rep. 418; *Great West M. Co.* v. *Woodmas M. Co.* 14 Colo. 90; 23 Pac. Rep. 908.

The language of Mr. Justice MILLER in *Oil Co.* v. *Marbury*, 91 U. S. 587, 592, with regard to the fluctuating value of oil wells, is equally applicable to mining lodes: "Property worth thousands to-day is worth nothing to-morrow; and that which to-day would sell for a thousand dollars, at its fair value, may by the natural changes of a week, or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious, of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit."

We think it is clear that the plaintiff did not make use of that diligence which the circumstances of the case called for, and the decree of the court below, dismissing his bill, is therefore,

Affirmed.

WATERVALE MINING CO. v. CHARLES W. LEACH ET AL.

(33 Pacific 418. Supreme Court of Arizona. April 15, 1893.)

[1]**Survey not on course of vein.** Rev. St. U. S. § 2320, providing that a mining claim shall not exceed 1,500 feet in length along the vein or lode, does not require the claim, in order to be valid, to be located along the course of a lode.

Lode leaving side lines. Where the side lines of a claim, instead of the end lines, cross the course of the lode, the side lines will be treated as end lines, in order to define the locator's right to pursue the lode on its dip.

The ore within the space of intersection means that body of ore bounded by the two walls of the one lode and the two walls of the intersecting lode.

[2]**Such ore belongs to the prior locator,** a right of way through it to the junior locator.

[3]**The crossing of lodes** does not mean the crossing of the two locations or surveys.

Details of the interference or crossing. The Black Eagle was the prior location. Later the Little Comet was surveyed across it at right angles and a lode was followed by drift from the Little Comet end line to the center of the Black Eagle survey apparently tending to cross the entire width of the Black Eagle. *Held*, that the ore in the Little Comet vein within the Black Eagle lines belonged to the Black Eagle claim.

Appeal from District Court, Cochise County; RICHARD E. SLOAN, Judge.

Action by the Watervale Mining Company against Charles W. Leach and E. B. Gage. From a judgment for defendants, plaintiff appeals. Reversed.

[1]*Walsh* v. *Mueller*, 16 Mont. 180; 40 Pac. 292.

[2]*Calhoun Co.* v. *Ajax Co.* 182 U. S. 499; 27 Colo. 1.

[3]*Book* v. *Justice Co.* 17 M. R. 617. *Lee* v. *Stahl*, 16 M. R. 152. *Omar* v. *Soper*, 15 M. R. 496. *Morgenson* v. *Middlesex Co.* 11 Colo. 176; 17 Pac. 513.

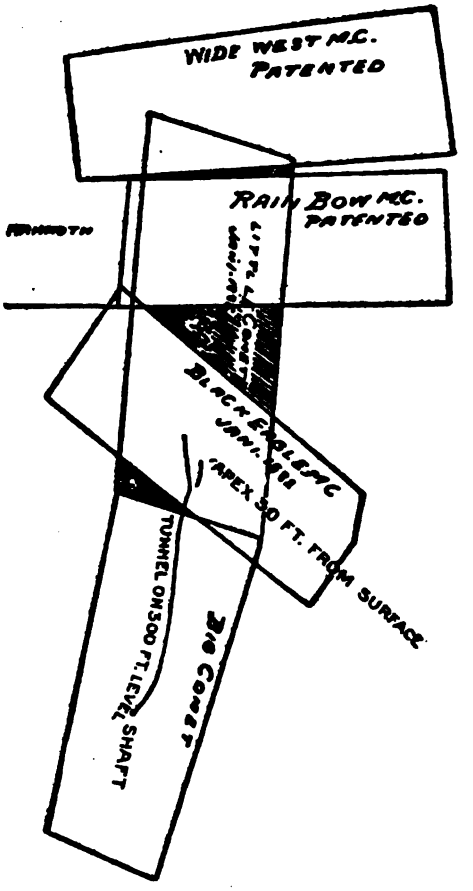
Where the conflict is conveyed the grantor is estopped to claim a cross lode. *Stinchfield* v. *Gillis*, 17 M. R. 497.

WM. H. STILLWELL, for appellant.

WILLIAM HERRING, for appellees.

KIBBEY, J. This action grew out of the assertion and exercise by the appellees (defendants below) of a disputed right to extract and appropriate silver ore from a lode lying within the boundary limits of the mining claim known as the "Black Eagle," owned by the appellant. The facts disclosed by the record, so far as they are pertinent to the question presented to this court, are that on the 1st day of January, 1882, the Black Eagle mining location was made; that since that time the claimants of that mine have performed all the statutory requirements essential to constitute it a valid mining claim. The Black Eagle claim lies in a northwesterly and southeasterly direction, and is approximately a parallelogram—— feet in length and —— feet in width. Appellant is the owner of the claim by several mesne conveyances from the original locators. Three years after the location of the Black Eagle mine the Little Comet mine was located, and the statutory requirements to constitute that a valid mining claim have been complied with. The appellees are the owners of the Little Comet mine. The Little Comet claim intersects, and partially overlies, the Black Eagle claim, so that a part of the Black Eagle and of the Little Comet lie within common boundaries. A distinct, well-defined lode of silver ore has been found and traced, by means of a tunnel driven on the lode, following its axis, for a distance of 1,200 or 1,500 feet from a point without the boundaries of either claim to a point 285 feet within the boundaries of the Black Eagle claim, and within the side lines of the Little Comet. The entrance to the tunnel is at the 300-foot level, on the Big Comet mine, owned and operated by the appellees, and of which the Little Comet is practically a northern extension. The apex of the lode, so far as it has been disclosed by de-

velopment, is within the side lines of the Big Comet, as well as of its extension—the Little Comet—and about 285 feet of its extent, as developed, is also within the surface boundaries of the Black Eagle. The following diagram will denote the relative positions of the several claims, and of the workings thereon:



The appellees have driven their tunnel into the ground within the Black Eagle claim, as denoted on the diagram, appropriated the ore found therein, and claim the owner-

ship thereof, and threaten to continue to extract and appropriate the ore therefrom. The appellant claims the ownership of the ore, and the right to mine it, under the provisions of section 2322, Rev. St. U. S. Appellees claim the ownership of the ore, except that at the space of actual intersection of the lodes, under the provisions of section 2326, Rev. St. U. S. asserting that the lode on the Little Comet crosses or intersects a lode on the Black Eagle. In fact, no intersecting lode has been encountered; but the court finds that there is a lode on the Black Eagle which, inferentially, the lode upon which the appellees have driven their tunnel will, if further exploited, be found to intersect.

The question presented to us for our consideration has not been the subject of former adjudication in this territory, or elsewhere, we believe, except in the state of Colorado. Because of the novelty of the question here, and the fact that we arrive at a conclusion at variance with that of the Colorado court, we feel justified in stating more at length the reason for our conclusion than we should otherwise do.

Our mining laws have grown from, and been suggested by, the practice of the miners themselves. As, from time to time, conditions changed, the miners framed rules applicable thereto. These rules had no reference, in the first instance, to the acquisition of the title, either to the mineral, or to the land in which it was found. The title was, admittedly, at least in the western states, in the United States, but that title was ignored by the early miners, and the invasion of the rights of the United States, by the miners, in entering upon its lands, and extracting therefrom and appropriating the valuable minerals, was not resented by that government. The rules of the miners referred almost exclusively to the ascertainment and enforcement of their individual claims, as among themselves. At first, and until 1872, the substantial thing claimed by the miner was the lode-bearing mineral. He cared nothing for the soil or

land itself, except as it was a necessary adjunct to the process of mining. His only claim to the surface was that he might have a place whereon to erect his mill, his hoisting works, and, if he desired, to live, and to deposit the debris resulting from the process of mining. His only claim to the ground below the surface, outside the limits of his lode, was to its use for reaching and extracting the ore from his lode, by tunneling, drifting, etc., or to obtain the water necessary for carrying on his mining operations. His right to extract mineral was confined to the limits of the lode that he had discovered and located. The right was dependent upon discovery, and the observance of, and compliance with, certain rules prescribed by the miners themselves, or by local statute, designed chiefly to give publicity and certainty to the fact and extent of his claim, and to afford evidence of his good faith in the location. These rules, almost from the beginning, limited the extent of the lode which might be claimed. It was provided that the miner should not have more than a designated number of feet of the lode he might discover and locate, to be measured along the course of the lode itself. With the lode he acquired the right to all its dips, angles, spurs, and variations; but he acquired no right to any cross or intersecting lode, or to any parallel lode. His claim was to the lode which he had discovered and located, staked, monumented, and exploited in the manner prescribed by the miners' rules and the local statutes, and to all its dips, angles, spurs, and variations, which were a substantial part of it. So long as he was able to establish that any particular ore body was a part of the lode that he had legally located, and was within the longitudinal limits of his claim, he established his right to that ore. To isolate his lode from all others was to define his claim. It is well known that lodes are not uniform in their course, their dip, nor in any of their dimensions, nor in the character of the ore that they carry; that in their course

and upon their dip, they may divide, and may or may not reunite; that there may be a principal, or, as miners some times denominate it, a "mother" lode; diverging from it are spurs, offshoots, or branch lodes; that the lodes are subject to faults or displacement of their fractured ends, breaking the continuity of the lode; that the lode may be crossed on its strike or course, or upon its dip, by other and distinct lodes, of similar or different character; that a lode may, in parts of its course, be overlaid by an adjacent lode; that a lode may at any part of its strike, or upon its dip, "pinch out" or vanish. These incidental characteristics of ore lodes cannot be determined except by complete exploration of the lode itself. Indeed, not all of them can be ascertained until after the complete removal of all the lode material, leaving only the matrix. The miner cannot know what is in advance of his drill, in any direction. He cannot often, with any probability of fulfillment, predict.

The first act of congress recognizing the rights of miners was in 1866, which, among other things, provided for patenting to persons who claimed a lode of quartz, or other rock in place, bearing gold, silver, etc. Here congress recognized the customs and rules of the miners, whereby the claim was to the lode, as distinguished from the land itself. It was inevitable, from this condition of things, that disputes should arise among rival claimants to mineral-bearing lodes. The question of priority of discovery and notice, and of the extent of the claim, were of easy solution. The question of the identity of the lode presented almost insurmountable obstacles. True, lawsuits were instituted and decided. Courts found that ore found in one place was from the same lode as that discovered, maybe, 1,000 feet away. Mining experts and geologists projected into the realm of fact their theories and their guesses. This was the best that could be done. Certainty was impossible. An approach to it was improbable. Mining rights were most precarious. The miner's

right to that part of the lode at his discovery shaft was subject to defeasance by establishing that he was upon but a spur of his neighbor's lode, and not on his lode. These conditions were provocative of disputes, and of consequent litigation. They afforded a premium to the unscrupulous to institute lawsuits, for in them the chances of success for the unjust and the just were about equal. It was but a lottery.

In 1872 congress enacted a new mining law. We may surely assume that congress well knew of the evils arising from the application of the old rule relative to the acquisition of mining rights. By section 2319, Rev. St. U. S. it is provided "that all valuable mineral deposits in lands belonging to the United States * * * are hereby declared to be free and open to exploration and purchase; and the lands in which they are found, to occupation and purchase." For the first time we here find the land in which mineral is found to be a substantial, integral part of the claim. Section 2322 gives, not the lode alone, but all lodes, veins, and ledges, throughout their entire depth, the top or apex of which lies inside of the surface lines of the claim extended downward vertically; and as lodes may dip, so that, when followed, they may be found to extend beyond the boundaries of the claim, congress further provides that they may nevertheless be followed, but that the locator shall be entitled only to such part thereof as lies between vertical planes drawn downward through the end lines of the claim. In other words, Congress has said to the miners: "Comply with the requirements that we impose, and the government of the United States will grant absolutely to you a piece of the earth, bounded at the surface by straight lines distinctly marked, and by planes extending through those lines to the center of the earth; and you shall have all lodes of mineral-bearing rock whose apex is within those boundaries." This is simple, plain, and the miner's rights are thereunder easy of ascertainment. He does nct have to

trouble with dips, spurs, and angles. If he or another makes dozens of distinct discoveries of one lode, or of a dozen diferent lodes, which have their apex within his boundaries, he is not concerned about their identity. No one can question his right to them. They are all within his slice of the earth, and by the express terms of the statute they are his. In two instances contemplated by the statute he may pursue a lode beyond the limits of his claim, or the ground within the boundaries of his claim may be invaded by an adjacent proprietor: First, when the lode, having its apex within the boundaries of his claim, shall dip beyond them (but even in that event he is limited by the planes passing through the end lines of his claim), and, second, when a locator shall have located a lode prior to the 10th day of May, 1872, under the mining laws then in force, and shall, as against a subsequent and overlapping claim, have saved his right to his lode in the manner prescribed in the act of 1872. In the latter case the prior locator may follow his lode, upon its strike or dip, into other ground than his own. It will immediately suggest itself to a legislator that, where a miner may follow a lode outside of his boundaries, he might encounter adverse rights in an adjoining claim. His lode might intersect a lode of an adjoining claim, or it might unite with it. With this in mind, congress enacted section 2336, whereby provision is made for the determination of what would otherwise be conflicting claims. It provides that at the space of the intersection of such lodes the oldest locator shall have the ore, and that the junior locator shall have a right of way through that space, to pursue and work his lode; that if there be a union of two lodes the senior locator shall take the ore at the space of intersection or union, and all of the lode below the point of union. These two sections, so construed, completely define, and make easy of ascertainment, the rights of the miner. They are easily applicable to any conditions that may arise, and eliminate from con-

sideration all perplexing questions that attend an attempt to identify, define, and isolate lodes. But we are asked to put a different construction upon section 2336—a construction that admittedly renders that section repugnant to section 2322. We are asked to go still further, and hold that section 2336, to the extent of such repugnancy, repeals, by implication, the provisions of section 2322. Counsel for the appellees have argued the question with great earnestness and ingenuity.

Preliminary, however, to the discussion of that question, we wish to dispose of another. It was argued during the presentation of this case, by the appellees, that a mining claim, to be valid, must be located along the course of a lode; that the statute contemplates that it shall be so done. The statute as we understand it only intends to prescribe the limit of extent along the course of the lode that the locator may claim, not that he shall locate so that the greatest dimension of his claim shall coincide with the course of the lode. It is provided that the extreme extent along the lode shall not exceed 1,500 feet. It may be less. And if the miner in making his location, should mistake the direction of the lode upon which he locates, and, accordingly, make the extreme dimensions of his claim in a direction other than that of the lode, that fact does not invalidate his claim, but only operates to diminish the extent of the lode that he might have included within the boundaries of his claim. Of course, congress expected that the miner would avail himself of the privilege accorded him, and locate along the course of the lode, but it does not require him to do so. The only result of not so locating is that the locator gets less, in extent, of the lode, than he otherwise would have located, and that if the side lines, instead of the end lines, cross the course of the lode, in order to define the locator's rights to pursue the lode on its dip the side lines will be treated as end lines. *Mining Co.* v. *Tarbet*, 98 U. S. 463.

Section 2322, Rev. St. U. S. is as follows: "Sec. 2322. The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the 10th day of May, 1872, so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States, governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and all of veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends, in its downward course, beyond the vertical lines of his claim, to enter upon the surface of a claim owned or possessed by another." And section 2336 is as follows: "Sec. 2336. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection, but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine; and, where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

The appellees claim that they discovered a lode of ore subsequent, in point of time, to the location of the appellant's mine—the Black Eagle—the discovery being at a point on the lode south and outside of the surface limits of the Black Eagle claim; that they have traced that lode by tunneling within its walls a considerable distance into the ground of the Black Eagle; that that which is inferentially the same lode has been discovered at a point north of the Black Eagle claim; that these points of discovery are on the general strike of the lode, which is traced from a point from the Miners' Dream claim northwardly through the length of the Big Comet, and on the same general course into the Little Comet and the Black Eagle, to the point of dispute. There seems to be no reasonable doubt of the identity of the lode on its course from the Miner's Dream to the face of the tunnel in the ground of the Black Eagle. The appellees, in their answer, allege that up to that time this lode had not encountered or crossed any other lode or vein; but they urge that inasmuch as the court below finds that the Black Eagle is a valid mining claim, it must have found, as a condition precedent to the validity of the claim, the fact that there was upon that claim a lode, vein, or ledge containing quartz, or other rock bearing mineral. There is in the record evidence that discoveries of ore were made in several places on the Black Eagle claim, and that if a line were drawn, connecting these several points of discovery, that line, if extended in the same general course, would cross the supposed course of what, for convenience of expression, we may call the Little Comet lode. The fact of an actual crossing or intersection of two lodes is not testified to, admitted or proved. Appellees contend that the inference of the facts testified to is aided by the presumption that the Black Eagle claim was located longitudinally along the course of a lode, and that therefrom it must be inferred that there is an actual intersection, somewhere within the limits of both the Black

Eagle and the Little Comet, of the Little Comet lode and some lode in the Black Eagle; and upon the existence of the fact of such a crossing the appellees claim that section 2336 gives them the right to all the ore in the Little Comet lode, within the boundaries of that claim, whether within the boundaries of the Black Eagle or not, except the ore within the "space of intersection." We cannot doubt that the expression, the "ore within the space of intersection," means that body of ore bounded by the foot and hanging walls of one lode extended in a general course of that lode, and the foot and the hanging walls of the intersecting lode, extended upon its general course. It is only to this body of ore, limited, as we have noted, that section 2336 relates. In one instance the body of ore is given to the prior locator, and in the other a right of way is given through that body of ore to the junior locator. It cannot relate to ore outside of the space of intersection. It does not do so in terms, and we do not feel justified to extend it by construction. By section 2322 we think it clear that a locator cannot go outside of any of his lines on the strike or course of any lode, except under rights acquired by him prior to the enactment of 1872, and saved to him under the provisions of that act. That doctrine is clearly enunciated in the Flagstaff Case, before cited. The right of the miner to go beyond the limits of his claim on the strike of a lode can only be given by the construction of section 2336 claimed by the appellees; and that is that that section was designed to give a new right where lodes in fact cross, and not to define and settle prior existing rights at the space of intersection. In other words, if a lode on a junior location intersects, on its strike, within the boundaries of a senior location, a lode on such senior location, then the junior locator may take all the ore in the first-mentioned lode, within the boundaries of both the senior and junior location, except at the space of intersection, notwithstanding that section 2322 limits the locator to his own bound-

aries, except when pursuing a lode on its dip, and that to this extent section 2336 repeals section 2322. There need be here no discussion of appellees' proposition that, as between conflicting sections of the same statute, the last in the order of arrangement shall prevail. In this connection we may only add that Mr. Sutherland, in his work on Statutory Construction, cited by the appellees, in the same section wherein he announces this canon of statutory construction, says: "This rule is applicable where no reasonable construction will harmonize the parts. It is intended that each part of a statute is intended to co-act with every other part; that no part is intended to antagonize the general purpose of the enactment." Suth. St. Const. § 160. Do sections 2322 and 2336 conflict? Can they be harmonized by reasonable construction? We have indicated our construction of the two sections. They are thereby in complete harmony, and co-act for the accomplishment of what seems to us to be the very purpose of the statute, i. e., the establishment of a rule for the easy definition of miners' rights, and the elimination therefrom of the uncertainties of the old rule; the substitute for the lode claim, which must always be uncertain, and provocative of disputes in its practicable application, of the easily and well defined segment of the earth, with its mineral contents. Appellees assert that when a junior location crosses a prior location, and the lodes therein are cross lodes, the junior locator is entitled to all the ore found in his lode, within the side lines of the senior location, except at the space of the intersection of the two lodes. In such case the prior locator has the right of way for the purpose of excavating and taking away the mineral in the cross vein. These propositions contain two elements that are not contemplated, at least in terms, by the statute. The statute does not in any place contemplate a crossing of locations. It does not say so. To so construe it is to say that "cross lodes" or "veins" mean cross locations; and if we are to adopt that

meaning—a plain distortion of the statute—we must be consistent, and read section 2336 with the words "cross locations" wherever the words "cross lodes" appear. The words used mean one or the other, or both, but certainly not the first only, or the second only, to the exclusion of the other, to suit convenience. We do not wish to be understood to accede to the proposition that "lode, vein or ledge" means other than "lode, vein, and ledge." It is the grossest brutality of statutory construction to attempt to construe those words to mean "locations" or "claims." But it seems to us that appellees are no better off, even with that substitution. Reading that section as if the word was "location," instead of "vein or lode," even then appellees, not having the prior location, would have no right to any ore within the space of intersection of the claims. In that event the space of intersection is the space bounded by the side lines of the Black Eagle on the north and south and by the side lines of the Little Comet on the east and west; and by section 2336 the ore therein belongs to the oldest location, i. e., the appellant, or owner of the Black Eagle. At most, the appellees could have a right of way only through this space of intersection whereby to reach and extract their ore north of, and beyond, the Black Eagle's north side line.

The first case in which there is a construction of section 2336, to which our attention has been called, is the case of *Hall* v. *Mining Co.*, Morr. Min. Rights,[1] at page 282. The opinion was delivered by Hallett, United States District Judge for the District of Colorado. The great reputation of Judge Hallett for erudition, especially in questions involving mining rights, gives rise to much diffidence upon our part in attempting to criticise his decision in that case. The decision in that case was upon a motion to dissolve an injunction. It seems that the Colorado Central lode and the Equator lode, in the Griffith

[1]3d Edition, 1879.

mining district, in Colorado, were both patented lodes. The patent for the Central lode is senior to that of the Equator, but its location is junior to that of the Equator, the location of the Equator lode having been made in 1866. The patents to each were in 1875.

Each location was 50 feet in width, and one was 1,400, and the other 1,500, in length. Their general course was east and west, the course of one departing about 12 degrees from that of the other. The east end of the Central overlapped the west end of the Equator in such a way as to leave a small part of each projecting beyond the north side lines of the other. It further appears "that," in the language of Judge Hallett, "these locations were made as and for different lodes, crossing each other with an acute angle of about twelve degrees, and each extending beyond the lines of the other for a distance of more than 200 feet." The dispute in the case arose over the ownership of ore in a body of ore found in or under the east end of the Central, and thence extending westward to and across the intersection with the Equator location. Premising that any priorities acquired by previous discoveries or locations are merged in the patents, and that priority of right thereafter depends on priority of patent, Judge Hallett proceeds to the consideration of sections 2322 and 2336. He says: "The general language of section 2322 seems to comprehend all lodes having their tops and apexes in the territory described by the patent, whether the same lie transversely or collaterally to the principal lode on which the location was made. Considered by itself, such would be the meaning and effect of that section. But there is another section relating to cross lodes which is of different import." He then quotes section 2336, and proceeds: "It will be observed that by this section the first locator and patentee of a lode gets only such part of cross and intersecting veins as lie within the space of intersection, to the exclusion of the remainder of such lode and veins lying within his own terri-

tory."[1] And this is all that Judge Hallett says upon the subject, except to say that therefore section 2336 repeals *pro tanto* section 2322, and deduces the conclusion that the subsequent patentee is entitled to all the intersecting lode, except at the space of intersection. If this is the construction of section 2336, then a locator of a mining claim does not become the owner of all the lodes, veins, and ledges in his segment of earth, whether there be a prior locator and patentee or not, for at the time of patent the first patentee is the only patentee. This seems a strange situation to us. It is a relegation of the whole system of acquirement of mining rights to the methods prevailing prior to 1872. The miners' rights are again made to depend on the existence of facts, the establishment of which cannot be made until after the time of the enjoyment of the right is irrevocably gone. How can the miner know that the lode upon which he locates is not a cross lode—that is, a cross lode in the sense Judge Hallett uses that term? It seems to us that Judge Hallett overlooked the fact that section 2336 referred to no rights whatever in cross lodes, except at the point of intersection. It does not in terms, and we certainly think cannot by implication relate to rights in any lode except at the space of intersection. Congress only contemplates that if A has a valid right to the ore in a given lode, and B the ore in another, and if those lodes happen at some point to intersect, then, by section 2336, their rights within the space of intersection are to be defined. The right of A to the ore in his lode, and of B in his, were not, and are not, in any wise dependent upon the fact of crossing. The learned judge seems in one instance to designate by the term "cross lode" a lode whose general course is along the shortest dimension of the claim, while, in the other instance, a lode which in fact crosses another lode. Every lode may, in fact, be both. If by "cross lode" is meant a lode crossing a claim, what of a lode that is as nearly transverse as longitudinal? What of a lode that

is partly transverse, and partly longitudinal? If by "cross lode" is meant a lode crossing another lode, where must the intersection be—within or without the claim of one or the other, or of both of the claims of the contestants? How can it be known that in the latter sense a lode is a cross lode, until the fact of crossing is substantiated? May a man go upon a claim, work out the ore, and then find that his lode was a "cross lode," and he thereby be made a trespasser, *ab initio*, even as against a subsequent locator? The logical result of such a construction but confounds the confusion sought to be avoided.

We are next referred to the case of *Branagan* v. *Dulaney* 8 Colo. 409; 8 Pac. Rep. 669. That case simply follows *Hall* v. *Mining Co.*, *supra*, decided by Judge Hallett, and is subject to the same criticism. The next case in chronological order is *Lee* v. *Stahl*, 9 Colo. 208; 11 Pac. Rep. 77. The court there simply follows the Equator Case and *Branagan* v. *Dulaney*, without comment, and so with the other Colorado cases cited. We are cited to some decisions by the department of the interior. Without discussing them, we can only say that so far as they attempt to construe section 2336 as giving rights in any lode outside of the space of intersection with another lode, each of the intersecting lodes being owned by different persons, we cannot agree with them.

It was argued at the trial of this case that, as a matter of fact, lodes, veins, and ledges do not intersect, except upon their strike; that an instance of a crossing upon the dip of two veins was unknown, and that, therefore, section 2336 must refer to the crossing of lodes on their strike; that Congress would not legislate to define rights dependent upon a condition that can never happen. If it be true that an instance of two lodes intersecting upon their dip is unknown, that fact is only evidence, and we think very slight evidence, that they may not do so. It is a complete answer to that that lodes can cross on their dip. But we think it unimportant

whether they can or not. Congress had in mind, at the time of the enactment of the law of 1872, that, as mining rights then stood, A's lode might legally cross B's lode on the strike, and whether on the dip or not makes no difference; and section 2336 was designed to define the rights of A and B in the space of intersection. Under the construction of sections 2322 and 2336 we are within the plain, unambiguous terms of the statute, giving to every part of it its full meaning and effect. It results in a beautifully simple means of defining mining rights. The construction urged by appellees, and supported by the Equator and subsequent Colorado decisions, violates the language of the statute, injects into it things not there, results in conflict in the statute among its parts, and makes infinitely more complex the old system of lode claims.

The case is reversed.

GOODING, C. J. SLOAN and WELLS, JJ., concur.

WATERLOO MINING CO. v. JOHN S. DOE ET AL.

(56 Federal 685. Circuit Court S. D. California. April 18, 1893.)

The patent is a conclusive determination of the true location of the mining claim it describes.

Incidental occupation, not location. The use of an unclaimed piece of ground by a mining company for buildings and for the construction of a tunnel thereunder to aid in the working of the company's claim does not initiate any right to the ground as an independent mining claim.

[1]**Float ore no discovery of lode.** The fact that three tons of silver-bearing rock, yielding $600, have been extracted from a mining claim, does not entitle the locator to enter the claim for a patent when no vein or lode has been discovered within the limits of the claim, the location having been made merely in the hope of finding such at some future time.

Proceeding by the Waterloo Mining Co. against John S. Doe, James L. Patterson, and Diedrich Bahten to determine the right to a mining claim. Decree declaring that neither party is entitled to the disputed ground.

A. H. RICKETTS, for complainant.

C. J. PERKINS and R. S. MESICK, for defendants Doe and Patterson.

[1] *Van Zandt* v. *Argentine Co.* 4 M. R. 441. *Stevens* v. *Williams*, 1 M. R. 557. *Tabor* v. *Dexter*, 9 M. R. 614. *Leadville Co.* v. *Fitzgerald*, 4 M. R. 380.

Valid location may be made whenever prospector has discovered such indications of mineral as he is willing to follow up. *Burke* v. *McDonald*, (Ida.) 29 Pac. 98.

"Crevice" means a mineral bearing vein. *Beals* v. *Cone*, 27 Colo. 473; 62 Pac. 948.

The locator must disclose mineral value in some form. *Copper Co.* v. *Allman*, 23 Utah 410; 64 Pac. 1019.

The fact that the lode is shattered at surface does not make it not "rock in place." *Jones* v. *Prospect Co.* 17 M. R. 530.

The phrase "indications of mineral" used in instruction as to what is sufficient to justify location. *Burke* v. *McDonald*, 17 M. R. 325.

Ross, District Judge. All of the mining claims mentioned herein lie on the southerly side of Calico mountain, in San Bernardino County, of this state, and within the Calico mining district. Of these claims the Silver King is highest upon the mountain side. Immediately south of and adjoining that is the Oriental No. 2; immediately south of and adjoining the Oriental No. 2 is the Oregon No. 3 (the ground in dispute); next lower down the mountain is the Oregon, the Oregon and Oriental No. 2, however, having a common corner, and the Oregon No. 3 being a triangular shaped piece of ground lying between them; and immediately south of and adjoining the Oregon is the Silver Monument. The Silver King and Oregon are owned by the complainant, and the Oriental No. 2 and Silver Monument are owned by the respondent Doe. Both parties claim the Oregon No. 3. The ground embraced by that claim was located as a mining lode claim, and called "Oregon No. 3," by D. Bahten, on or about the 22d day of August, 1885. At the time of such location, however, no vein or lode had been discovered within the boundaries of the claim, but, according to Bahten's own testimony, his location was made "in the hope of finding some ore in it at some time." In 1886, Bahten leased the Oregon No. 3 claim, for mining purposes, to a man named Stevens, who mined therefrom about three tons of silver-bearing rock, which yielded him $600. In 1887 Bahten sold the claim to the respondent Doe for $2,000. Doe subsequently relocated the ground in his own name, and in making such relocation included within the lines of the claim some ground which had been left out of the official survey of the Oriental No. 2. Upon this relocation Doe applied in the United States land office at Los Angeles for a patent for the ground thus claimed. Against its issuance the complainant protested in the land office, and within the statutory time commenced the present suit to determine the conflicting claims of the

respective parties to the ground embraced within the Oregon No. 3 claim.

The Oregon claim, which is now patented, and the property, as has been said, of the complainant, was originally located by James Waldrip in July, 1881. The immediate predecessor in interest of the complainant was a corporation called the Oro Grande Company; and that company, of which Bahten was vice-president and general manager, was the owner and in possession of the Silver King and Oregon claims at the time Bahten located the Oregon No. 3.

The grounds upon which the complainant relies for a judgment in its favor are, in substance: First, that the ground in controversy was in fact a part of the Oregon claim as located by Waldrip, in 1881, and was omitted from the official survey and patent of that claim through the fraudulent acts of Bahten; second, that both the Oro Grande Company and complainant have made such use of the ground in controversy as raise a privilege in their behalf inconsistent with the acquisition of any right by the respondent to become the purchaser of it from the government; third, that the location of the ground made by Bahten and sold to Doe was made under such circumstances of bad faith and wrong-doing towards tne Oro Grande Company (of which Doe had knowledge) that his location inured to the benefit of that company, and through it to the complainant; fourth, that the ground in controversy was not subject to location, nor properly located, so as to entitle respondent to become a purchaser thereof from the government.

As a matter of fact the official survey of the Oregon claim, upon which the complainant's predecessor in interest, the Oro Grande Company, applied for and received the government patent, did not include the ground afterwards located and now claimed as the Oregon No. 3. The record shows that at the time of the making of the official survey of the Oregon claim, and at the time of the making of the application

for a patent for it, based upon that survey, Bahten was vice-president and general manager of the company making the application; but there is nothing in the record showing or tending to show that the ground here in question and known as the "Oregon No. 3 Claim" was omitted from the official survey and patent of the Oregon claim by reason of any fraud practiced by Bahten or any one else. The case shows that Frederick E. Lewis was the United States deputy mineral surveyor for California, who made the official survey of the Oregon claim, and that he directed Bahten to send for Waldrip, the original locator of the claim, to point out its monuments and boundaries, for the reason that the location notice was indefinite, and he wished to know from the locator himself where the monuments were originally placed. In accordance with that direction, Bahten sent for Waldrip, who came and pointed out to the surveyor what he claimed to be the original monuments and boundaries. The evidence shows that in doing so Waldrip was not prompted by Bahten or any one else, and that, whether correctly designated or not, the corners and lines pointed out by him were not the result of any improper influence exerted by Lewis, Bahten, or any other person. The boundaries thus pointed out by the original locator of the Oregon claim were the boundaries adopted by the government surveyor, and returned by him to the land office, and upon which the government patent was issued to and received by complainant's predecessor in interest, the Oro Grande Company.

The patent so issued is a conclusive determination of the true location of the Oregon claim; but, apart from this, the evidence in the case, I think, shows that the boundaries of that claim adopted by the government surveyor and embodied in the patent are in accordance with its boundaries as originally established by Waldrip. As has been said, they were pointed out to the surveyor by Waldrip himself. If he testified truly, and was not mistaken in respect to the boundaries pointed

out by him, there is no room for doubt upon this point. His testimony seems to have been given in a very straightforward manner, and bears every impress of truth. In his notice of location placed in the discovery monument, and recorded in the records of the mining district, in claiming 750 feet easterly and 750 feet westerly of the point of discovery, with 300 feet on each side of the vein, he added:

"Or so much of 300 feet as will not conflict with the boundary line of the Oriental Mine No. 2, and the northern boundaries line of Silver Monument's northern line. Said mine is situated south of and running parallel with the Silver King and Oriental No. 2, and north of the Silver Monument Mine."

It is urged on the part of the complainant that this language in the notice of location of the Oregon claim shows that the intention of the locator was to take up all of the vacant ground between the Oriental No. 2 and Silver Monument claims, and in the cross-examination of Waldrip it was strenuously endeavored by counsel to make him admit that such was his intention in using in the notice the language quoted. The explanation of the witness was that he knew that the Oriental No. 2 and Silver Monument claims had been previously located, although he did not know their precise lines. He did not therefore know whether there were 600 feet of ground between the two, and that, as he had no intention of infringing upon either of those claims, for the purpose of manifesting that intention he inserted in his notice of location of the Oregon claim the language already quoted. He knew the southeast corner of the Oriental No. 2 claim, and he adopted the monument that marked that corner as the northeast corner of the Oregon claim. Concerning that fact there is no dispute; and as there is no question but that the northern boundary of the Oregon claim as originally located was a straight line from this common corner of the Oriental No. 2 and Oregon claims to the northwest corner of the latter claim, wherever it was established, it is manifest that if the northwest corner of the Oregon was correctly

pointed out by Waldrip to and adopted by Lewis in the survey upon which the patent was issued, the ground here in controversy was not included in the original location of the Oregon claim.

In respect to the northwest corner of the Oregon, Waldrip is very specific in his statements. He says that he did not and could not establish the northwest corner of the claim in line with its southwest corner and west end center monuments because of a deep gulch that existed in the side of the mountain, and which compelled him to diverge to the east. That he built the northwest corner monument of stone about 3 feet high, and on the edge of the gulch, which was about 20 feet deep, and so close to it that in building the monument he came very near sliding down the hill. This fact, as well as the physical character of the place, would naturally impress itself upon the memory of the witness. He further testifies that when he went there to point out the boundaries of the claim to the surveyor, that northwest corner monument was still standing where he placed it, although some of the rocks, probably one foot of them, had fallen off. I am satisfied this witness told the truth, and that between the Oriental No. 2 and the Oregon claim, as originally located as well as patented, there was a vacant triangular piece of ground, afterwards located by Bahten as the Oregon No. 3.

The case shows that the Silver King claim is worked by means of a tunnel that commences and extends for 14 feet in the ground here in dispute, located and known as the "Oregon No. 3," and through the Oriental No. 2 claim, into the Silver King ground. That tunnel was constructed into and across the Oriental No. 2 ground by the owners of the Silver King claim under license and permission given them by the owners of the Oriental No. 2, upon the conditions that the tunnel should be for the joint use of the Silver King Company and the owners of the Oriental No. 2 claim, and that any ore encountered in the Oriental No. 2 ground in

running the tunnel should be the property of the owners of the Oriental No. 2 claim. The complainant and its predecessors in ownership of the Silver King claim, as necessary adjuncts in and about the operation of the tunnel so constructed, and for the working of the Silver King claim, erected upon the ground in dispute, and now known as the "Oregon No. 3 Claim," a blacksmith shop, a carpenter shop, a stable, a boiler house, a rail track, a waste dump, and, as has already been said, about 14 feet of the tunnel. None of these structures were erected, and no act was done in connection with them, with any reference to the location, working, or development of the ground in dispute as a mining claim, or for any purpose other than that of subserving the purpose of working and developing the Silver King mine. It is perfectly clear that the possession thus held by the complainant and its predecessors in interest of the ground in dispute, and the buildings erected and acts performed by them for the purposes stated, could not initiate any right to the ground in dispute as an independent mining claim. Whether ground so possessed and used is open to location as a mining claim by one having trust relations with those so possessed of and using the ground, or is subject to relocation by the grantee of such person with notice of the trust relations, need not be determined, for the reason that I think it clear from the evidence that neither at the time of Bahten's location of the Oregon No. 3, nor at the time of its relocation by his grantee, the respondent Doe, had there been discovered, nor has there yet been discovered, so far as the evidence shows, any vein or lode of quartz or other rock in place within the boundaries of the claim.

As has been already observed, Bahten himself admits in his testimony that at the time his location was made there had been no such discovery made, but that the claim was located "in the hope of finding some ore in it at some time;" and the testimony of Mr. John Hays Hammond, a

mining engineer of much learning and experience, and who made a critical examination of the ground shortly before giving his testimony, shows clearly that no vein or lode has yet been discovered within the boundaries of the claim; that there are no outcroppings of any vein or lode upon the surface of the ground; and the little exploration that has been made by means of cuts, a small tunnel, and a shallow shaft has failed to disclose any such vein or lode. It is quite true that from one or more of the cuts Stevens extracted the ore already mentioned, and that other mineral-bearing rock exists in them, samples of which were introduced in evidence as exhibits in this case. But the testimony of Hammond, which is not overcome or impaired by that of Tucker, Patterson, Scupham, or any other witness, shows that it did not come from any defined vein or lode, so far as can be ascertained from developments so far made. It is obvious that without the discovery of a vein or lode the ground in question was not subject to location as a mining lode claim. I am therefore of opinion that neither party to the suit is entitled to enter the ground embraced within the boundaries of the Oregon No. 3 as a mining claim.

A decree in accordance with these views will be entered.

GEORGE W. HALL v. HENRY S. KEARNY ET AL.

(18 Colorado 505; 33 Pac. 373. Supreme Court. June 5, 1893.)

In annual labor case burden of proof shifts, when. The burden of proving a forfeiture is always upon the party relying upon the same. This is discharged prima facie by showing that no work during the year had been done upon the lode or upon the surface boundaries thereof.

[1]**Utility of work done outside claim must be shown.** When it appears that the work, claimed to be the annual assessment, had not been done within the surface boundaries of the location, but upon other property, it is incumbent upon the party so contending to show that such work was in fact intended as the annual assessment upon the claim and was of such a character as that it would inure to the benefit thereof.

Work done on adjoining patented ground. Work which is in fact done for the development of a mining claim may properly be considered as assessment work for such location, notwithstanding the fact that it was performed outside of the exterior lines of such property. And it is immaterial whether the improvement is upon patented or unpatented property.

A lode discovered in a tunnel run through patented ground by license may be lawfully located by the licensee—whether he becomes a Trustee for the owner of the tunnel, not decided.

Appeal from the District Court of Clear Creek County.

In 1886 George W. Hall, the owner of the Monitor Extension Lode mining claim, applied for a patent for the same. Kearny and Nolan, claiming to be the owners of the John Randolph and Roscoe Lode mining claims, both conflicting

[1]The claims must be contiguous. *Gird* v. *California Co.* 18 M. R.— *Royston* v. *Miller*, 76 Fed. 50; 18 M. R.—

Work done on one of the group counts where it tends to the development, drainage or getting access to, the claim in contention. *Packer* v. *Heaton*, 4 M. R. 447. *Kramer* v. *Settle*, 9 M. R. 561. *Klopenstine* v. *Hays*, 20 Utah 45; 57 Pac. 712. *Chambers* v. *Harrington*, 111 U. S. 350. *Jupiter Co.* v. *Bodie Co.* 4 M. R. 413. *St. Louis Co.* v. *Kemp*, 11 M. R. 692. *DeNoon* v. *Morrison*, 16 M. R. 33.

See note to *Mattingly* v. *Lewisohn*, 17 M. R. 693.

with the Monitor Extension location, instituted this suit in support of two adverse claims filed by them against Hall's application for a patent.

The complaint is in the ordinary form for the claim and possession of real property, with the additional averment that the suit is brought to make good these adverse claims. The answer denies all material allegations of the complaint, and sets up title in Hall to the Monitor Extension mining claim. It also alleges failure by plaintiffs to do the necessary annual labor on the Roscoe and Randolph Lodes, for the years 1883, '84 and '85, and the subsequent location over them of the Monitor Extension Lode. By these pleadings it appears that a part of the premises in controversy is covered by each of the three locations. All the new matter in the answer is denied by the replication. A trial to a jury resulted in a verdict and judgment for plaintiffs.

Messrs. MORRISON & FILLIUS, for appellant

Mr. L. C. ROCKWELL, for appellees.

Chief Justice HAYT delivered the opinion of the court.

The location of the Monitor Extension Lode is subsequent in point of time to both the Roscoe and Randolph locations, made by appellees Kearny and Nolan. The judgment of the district court in favor of appellees must therefore be sustained, unless it appears that the location of either the Roscoe or Randolph Lodes was not perfected as required by law in the first instance, or that appellees failed to keep the locations good.

The principal point of contention in the court below grew out of the forfeiture claimed by Hall because of the alleged failure of appellees to do the annual labor upon their claims for the year 1884. Considerable testimony was introduced for the purpose of showing the nature and extent of the

work claimed as the annual labor for the Roscoe and John Randolph Lode for that and other years. The uncontradicted evidence shows that, in the year 1883, appellees commenced a tunnel near the west side line of the John Randolph location, and extended the same from time to time until a distance of 127 feet westward was reached. The greater portion of this tunnel is upon a patented mining claim known as the Nolan-Gilmer Lode, and at the time the property of appellees. In the year 1884 appellees sunk an incline near the breast of this tunnel and upon the patented territory. They claim that the work in this tunnel and upon the incline was done for the purpose of developing the Roscoe and John Randolph claims, and that it should be treated as a compliance with the law relating to annual assessment work. The appellant denies that the work was done for this purpose, or that, as a matter of fact, it in any way inured to the benefit of appellees' claims, or either of them. All, or nearly all the work claimed as annual assessment work for the years 1884 and 1885 was done within the territory covered by the Nolan-Gilmer patent, in the prosecution of this tunnel and incline. Appellees being able to satisfy the jury as to the validity of their locations, Hall could acquire no adverse rights by reason of the Monitor Extension location made in 1885, unless appellees had forfeited their prior rights to the premises by a failure to do the necessary assessment work for the preceding year.

The foregoing statement will be sufficient to show the importance of having the jury correctly instructed upon the question of forfeiture thus raised. Instruction No. 5, given by the court below, reads as follows:—

"You are further instructed, if Hall claims the Randolph and Roscoe Lodes became forfeited by reason of the failure by plaintiffs to do the annual labor thereon in 1884, the burden of proof is on him to show by a fair preponderance of testimony the work which plaintiffs did do was not of

such character as to the place where done, it would inure to the benefit of said Randolph and Roscoe Lodes as annual labor."

Under the circumstances of this case the instruction is erroneous.

Although the burden of proving a forfeiture is always upon the party relying upon the same, in this case this burden was discharged, *prima facie*, by showing that no work during the year 1884 had been done upon either the Randolph or Roscoe Lodes, or within the surface boundaries of either of these claims.

If labor was in fact performed upon adjacent property that might properly be considered as development work for these claims, as contended, it devolved upon Kearny and Nolan, and not upon Hall, to show affirmatively such facts. Appellees attempted to meet this requirement by showing that they had started a tunnel near the west side line of their claims, (the west side lines of both being practically the same at this point). This tunnel was extended out of and away from the claims in controversy into patented territory in which they were also interested. Under these circumstances there is no presumption that this work was for the development of either the John Randolph or Roscoe claims; in fact, the presumption is against such contention, and after proof that the annual assessment had not been done within the surface boundaries of these locations, it was incumbent upon appellees to show that such work as had been done elsewhere was, in fact, intended as the annual assessment upon these claims, and was of such a character as that it would inure to the benefit thereof. By the instruction given at the trial this burden was placed upon appellant. For this error the judgment of the District Court must be set aside.

In view of a new trial, other assignments of error will be noticed. It is contended that under no circumstances can the work performed within the exterior lines embraced within

the Nolan-Gilmer patent be taken into consideration in determining whether the required labor or improvements were put upon the claims in controversy. In our opinion this claim of counsel is unsound. If the work was in fact done for the development of the Randolph and Roscoe claims, it may properly be considered as annual assessment work for such claims, notwithstanding the fact that it was performed outside of the exterior lines of such property.

In the case of *Doherty* v. *Morris*, 17 Colo. 105; 28 Pac. 85, an expenditure, incurred in constructing a wagon road across adjacent territory to a mining claim, for the purpose of better developing and operating such claim, was treated as a compliance with the law relating to annual assessment work. In the case of *Smelting Company* v. *Kemp*, 104 U. S. 636, it was held that labor and improvements might be considered within the meaning of the statute when the labor was performed, or the improvements were made for its development, though in fact such labor and improvements were at a distance from the claim. The latter opinion had reference to placer claims, and it was said that where the labor was performed for the turning of a stream, or the introduction of water to the claim, or where the improvement consists in the construction of a flume to carry off the debris or waste material, it might properly be considered as assessment work. Nothing is said in either of the opinions in the cases cited with reference to whether the work was upon patented or unpatented property, but we think it would be unreasonable to hold that such labor and improvements would not avail, even if upon patented property. Did the work where done tend to the development of the Randolph and Roscoe claims, and was it in fact performed for the benefit of these locations? are the controlling questions to be determined. And it is immaterial whether the improvement is upon patented or unpatented property, except as this may throw light upon the intention of the parties in doing the work.

It is also contended that plaintiffs committed a trespass in locating the John Randolph claim, and for this reason it is sought to invalidate that location. The facts upon which this is predicated are as follows: One James Hall, the owner of a claim adjoining the Nolan-Gilmer claim, had driven a prospecting tunnel for the development of his claim. Plaintiffs obtained permission from Hall to continue this tunnel for the purpose of developing the Nolan-Gilmer claim. They continued the tunnel across the Nolan-Gilmer patent without finding a lode, but upon extending it a few feet beyond the west side line of that location they did discover a lode which they located as the John Randolph. It is claimed that their rights in the tunnel were limited by their contract with Hall, and that any discovery made in the public domain to the west of the Nolan-Gilmer claim would inure to appellant, he being Hall's grantee as to such rights. In other words, it is urged that as the Randolph location had its origin in the discovery in the tunnel, in equity it belonged to Hall. This is entirely outside any issue made by the pleadings. If in fact appellees' license only authorized them to extend the tunnel through the Nolan-Gilmer territory, this did not prevent them from locating the lode discovered in the tunnel beyond the side lines of said claim, although this was not contemplated by their license. As to whether a trust was thereby created is a question not involved in this case, and the ruling of the district court in this particular must now be upheld.

For the error pointed out in the instructions, the judgment must be reversed.

Reversed.

LEHIGH ZINC & IRON CO. v. NEW JERSEY ZINC & IRON CO.

(55 New Jersey Law 350; 26 Atl. 920. Court of Errors and Appeals. June 20, 1893.)

Grant of one ore: Reserve of another. Review of previous construction of deeds between the litigants and their privies in which one sort of ore was reserved and another granted.

[1]**Ore without commercial value at date of deed.** Where certain ore at the time of making certain deeds containing grants of one sort of ores and reserve of another sort found in the same mine, had no commercial value, which value it afterwards acquired, such deeds are to be construed as referring to the conditions and value of such ore at the date of the delivery of the deeds.

A judicial determination of a question of fact binds only the parties in the cause and their privies, and is not even evidential against others.

[2]**Ore severed under claim of title.** Trover will not lie at the suit of the owner of land against a person who severs and converts to his own use what was a part of the realty, such as timber, ores, etc., if at the time of severance the defendant was in adverse possession of the realty under a bona fide claim of title.

Error to the Circuit Court, Sussex County, before Justice MAGIE. Action for conversion by the New Jersey Zinc & Iron Company against the Lehigh Zinc & Iron Company. Plaintiff had judgment, and defendant brings error. Reversed.

C. D. THOMPSON and GILBERT COLLINS, for plaintiff in error.

THOMAS N. MCCARTER, for defendant in error.

DIXON, J. This was an action of trover, brought to recover damages for the conversion of 23 car loads of ore mined by the defendant in January, 1889, on a tract of land known as

[1] *Hext* v. *Gill*, 17 M. R. 1. *Doster* v. *Friedensville Co.* 140 Pa. 147; 21 Atl. 251. *Genet* v. *Delaware Co.* 43 N. Y. Sup. 589. *Hosford* v. *Metcalf*, 113 Ia. 240; 84 N. W. 1054. *Hartwell* v. *Camman*, 3 M. R. 229.

[2] *National Co.* v. *Weston*, 17 M. R. 143.

the "Mine Hill Farm," in the township of Hardyston, and county of Sussex.

The plaintiff claimed title under several deeds, of which only three need be even partially recited. These are:

(1) A deed from Samuel Fowler to the Sussex Zinc & Copper Mining & Manufacturing Company, dated March 10, 1848, conveying in fee "all the zinc, copper, lead, silver, and gold ores, and also all other metals or ores containing metals, except the metal or ore called 'franklinite' and iron ores, when it exists separate from the zinc, existing, found, or to be found" on the Mine Hill Farm, "together with full and absolute liberty, license, power and authority * * * to open, dig, sink, blast, or make a pit or pits, shafts, levels, drains, and sloughs, and to search for, get, and take up, work, win, and dig all sorts of mines and minerals, veins or vein of zinc, copper, lead, silver, gold, and all other ores or metals except the franklinite and iron ores as aforesaid, together with * * * free ingress, egress, and regress unto and upon the said premises for the purpose aforesaid; * * * to have and to hold in fee-simple or in absolute ownership all and every the zinc, copper, lead, silver, gold, and other metals and ores, excepting the ore called 'franklinite' where it exists in a separate, distinct state from the zinc, which shall be found or gotten in, under or upon every or any of the said ground or premises."

(2) A deed between the same parties dated March .., 1849, ratifying and confirming the before-mentioned deed, and conveying all the rights and privileges therein named and granted.

(3) A deed from the Sussex Zinc & Copper Mining & Manufacturing Company to the New Jersey Zinc Company, dated March 8, 1852, conveying in fee simple "all the zinc and other ores, except franklinite and iron ores, found or to be found on * * * the Mine Hill Farm, * * * together with full and absolute liberty, license, power, and

authority * * * to open, dig, sink, blast, or make a pit or pits, shafts, levels, drains, and sloughs, and to search for, get, and take up, work, mine, and dig all sorts of mines and minerals, veins or vein of zinc, copper, lead, silver, gold, and all other ores or metals except the franklinite and iron ores, as herein provided, together also with * * * free ingress, egress, and regress into and upon the said premises for the purpose aforesaid; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, * * * and also all the estate, right, title, interest, property, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, and to the above-described premises, and every part and parcel thereof, with the appurtenances. To have and to hold," etc.

Owing to the difference between the exceptions mentioned in the first and third of the above deeds,—that in the first being, "except the metal or ore called 'franklinite' and iron ores when it exists separate from the zinc," and that in the third being, "except franklinite and iron ores,"—it has been claimed that the Sussex Zinc & Copper Mining & Manufacturing Company retained title to all the franklinite and iron ores on the Mine Hill Farm which was not separate from the zinc. But in *New Jersey Zinc Co.* v. *Boston Franklinite Co.* 15 N. J. Eq. 418, 438, this court decided that, by force of the clause in the third deed, which conveyed "all the estate," etc., "of the parties of the first part of, in, and to the above described premises," the Sussex Zinc & Copper Mining & Manufacturing Company conveyed to the New Jersey Zinc Company all the franklinite and iron ores which it had in the tract, so that the exception in the third deed was no larger than that in the first. This decision was rendered upon a purely legal question,—the construction of the deed upon its face,—and, as such is binding upon us. Moreover, it was rendered in a cause wherein the New Jersey

Zinc Company was a party, and the Sussex Zinc & Copper Mining & Manufacturing Company was either a party under a new name or was represented by a party owning whatever rights it had after making the above-mentioned deed; so that the decree in that cause became, as it were, a part of the conveyance itself, and, while it stands, that conveyance must be deemed to have transferred to the New Jersey Zinc Company all the estate and rights of the Sussex Zinc & Copper Mining & Manufacturing Company in the Mine Hill Farm. The plaintiff's title is derived from and embraces all the estate of the New Jersey Zinc Company.

The plaintiff insisted at the trial that the ore in suit was zinc ore, or at least had been dug from a vein which was not "separate from the zinc"; and having offered evidence tending to support this contention and to show conversion of the ore by the defendant, rested.

The defendant thereupon moved for a nonsuit, upon three grounds: First, because no demand had been shown; second, because at best the plaintiff had proved title to only an undivided half of the ore; third, because the defendant was in actual, notorious, peaceable, exclusive, and adverse possession of the mine from which the ore was taken, and therefore trover was not an appropriate remedy.

None of these grounds can be maintained. Demand and refusal constitute only one of the methods of showing conversion. The plaintiff relied upon a different method, equally legal and efficacious. If the plaintiff made out title to only an undivided half of the ore, yet it did not appear that the defendant was entitled to the other half; and the only irregularity thus disclosed was the nonjoinder of the plaintiff's co-tenant. Under section 37 of our practice act the defendant could not object to this for want of prior written notice of the objection. With respect to the third ground, it is enough to say that the plaintiff's testimony did not conclusively show an adverse possession by the defendant and without

this it is not claimed that trover is improper. Further attention will hereafter be given to the propriety of this remedy.

The motion to nonsuit was legally refused.

The defendant then produced its title, by which it appeared that its claim rested upon a deed dated December 13, 1850, made by Samuel Fowler to James L. Curtis and Daniel H. Curtis, trustees for the Franklinite Mining Company, conveying "all the reserved iron ore called 'franklinite' and all the other reserved ores and metals not granted or conveyed to the Sussex Zinc & Copper Mining & Manufacturing Company" by the Fowler deeds above mentioned, "found or to be found in * * * the Mine Hill Farm * * * together with full and absolute liberty, license, power, and authority to open, dig, sink, blast, or make a pit or pits, shafts, levels, drains and sloughs, and search for, get, and take, work, win, and dig the several ores of franklinite and iron and all other reserved ores on the premises aforesaid, * * * together with free ingress, egress, and regress into and upon the said premises for the purposes aforesaid; * * * to have and to hold in fee-simple or in absolute ownership all the franklinite and all other ores or metals reserved in the deeds hereinbefore referred to or not granted by them * * * which shall be found or gotten in, under, or upon * * * the said ground or premises * * * unto the said parties of the second part, their heirs, successors and assigns."

This deed, as well as the deeds above mentioned in the plaintiff's title, conveys real estate—a corporeal hereditament—in fee simple. *Rich* v. *Johnson*, 2 Strange 1142; *Stoughton* v. *Leigh*, 1 Taunt. 402; *Hartwell* v. *Camman*, 10 N. J. Eq. 128. They all clearly indicate a design to enable the grantees to pursue the business of mining, and to that end they must be construed as granting masses of ore *in situ*, distinct veins or strata, or distinct parts of a vein or stratum, which are capable of being mined. *New Jersey Zinc Co.* v.

New Jersey Franklinite Co. 13 N. J. Eq. 322. In the plaintiff's title, therefore, are all veins, strata, or masses of zinc ore which are capable of being mined, and all veins, strata, or masses of franklinite and iron ores, which are not "separate from the zinc," and are fit to be mined. In the defendant's title are only those veins, strata, and masses of franklinite and iron ores which are "separate from the zinc," and are fit for mining.

The meaning of this phrase, "separate from the zinc," as applied to franklinite, has given rise to some controversy. Franklinite is itself a compound of zinc, and therefore cannot exist chemically separated from the zinc. As the parties to these deeds were dealing with ores, we think that the phrase meant "separate from zinc ore"; and as by "zinc ore" is intended "a mineral body containing so much of the metal of zinc as to be worth smelting," (*New Jersey Zinc Co.* v. *New Jersey Franklinite Co.* 13 N. J. Eq. 346) we think the exception in the plaintiff's title should be so construed as to exclude from the title only those veins, strata, or masses of franklinite or iron ores which can be mined without interfering with any veins, strata, or masses of zinc ore in quantity and richness worth mining for zinc.

These deeds speak also with reference to the time of their execution, and are to be applied to their subject matter now as they would have applied then. If a specified vein, stratum, or mass of franklinite or iron ore can be removed without interfering with any zinc ore which in quantity and richness was then worth mining for zinc, that franklinite or iron ore would then, under our view of these deeds, have been excepted from plaintiff's title, and consequently it must be excepted now. No advance in the arts and sciences can extend those grants over any portion of the Mine Hill Farm which they would not at their date have been deemed to embrace by then applying to their terms and their subject matter correct rules of construction. "'*Contemporanea expositio est optima*

et fortissima in lege.' The best and surest mode of expounding an instrument is by referring to the time when, and the circumstances under which, it was made." Broom, Leg. Maxim 300; *N. J. Zinc Co.* v. *N. J. Franklinite Co.* 13 N. J. Eq. 342; *Shore* v. *Wilson*, 9 Clark & F. 566.

Thus is presented the issue of fact which involves the rights of these parties. The title of the plaintiff being in a sense general and that of the defendant particular only, the issue can be more readily stated in terms denoting the latter; thus, if the ore in suit was taken from a vein, stratum, or mass of franklinite or iron ore, without disturbing any vein, stratum, or mass of zinc ore which in 1848 would have been reasonably deemed fit to mine for zinc, then the defendant had a right to remove it; otherwise not.

On this issue the defendant at the trial offered to prove that the vein from which the ore in suit was taken, was in 1848 usually called "franklinite"; that, although this vein was then known to contain certain compounds of zinc mixed with the franklinite, yet these were then worthless as zinc ore, and were for that reason rejected by the New Jersey Zinc Company while it held the plaintiff's title; that of all the ores hitherto discovered on the Mine Hill Farm the only zinc ore then deemed commercially valuable was the red oxide of zinc, or red zinc ore, which is scarcely found in the vein worked by the defendant; that this vein was then available only as an iron ore, and did not become useful in the arts for the manufacture of zinc until the discovery, in 1866, of what is known as the "lime process"; and that those holding the plaintiff's title have always acquiesced in the occupation of this mine by those holding the defendant's title. These offers were severally and collectively overruled.

In this, we think, there was error. These propositions, if established, tended directly to support the defendant's side of the issue as it is above defined.

Testimony of this nature was received and considered in

the court of chancery, and this court in former litigation over these deeds (13 N. J. Eq. 322; 15 N. J. Eq. 418) for the purpose of enabling the courts to ascertain the subject matter which the parties intended their deeds to convey.

But it is urged that this court, in *New Jersey Zinc Co.* v. *Boston Franklinite Co.* 15 N. J. Eq. 418, adjudged the vein in dispute to be zinc ore, and so embraced in the plaintiff's title. Such was the determination in that case, but it was the determination of a question of fact. A decision of that character binds only the parties in the cause and their privies, and the present defendant stands in neither category. Against it, the decision is not conclusive, nor even evidential.

The defendant also offered to prove that, when it excavated the ore in suit, it was in open, peaceable, adverse and exclusive possession of the mine, under a bona fide claim of title to the realty, and insisted that, therefore, trover would not lie for the ore. This was overruled.

We have seen that plaintiff's title was that of an owner of real estate in fee. It is well settled that such an owner can generally maintain trover against a person who severs and converts to his own use what was part of the realty, as timber, ores, etc. *Berry* v. *Heard*, Cro. Car. 242; *Player* v. *Roberts*, W. Jones, 243; *Farrant* v. *Thompson*, 5 Barn. & Ald. 826; *Rowe* v. *Grenfel*, Ryan & M. 396; *Taylor* v. *Parry*, 1 Man. & G. 604; *Moores* v. *Wait*, 3 Wend. 104; *Riley* v. *Water Power Co.* 11 Cush. 11; *Kircher* v. *Schalk*, 39 N. J. Law 335; *Forsyth* v. *Wells*, 41 Pa. St. 291; Bainb. Mines 334.

But there is a considerable line of cases holding that if the defendant, at the time of severance, is in adverse possession of the realty under a bona fide claim of title, the thing severed becomes his property, so that the owner of the land cannot maintain trover or replevin therefor, but must resort to his remedy for the possession of the land and mesne profits. *Mather* v. *Trinity Church*, 3 Serg. & R. 509; *Powell* v. *Smith*, 2 Watts 126; *Transit Co.* v. *Weston*, 121 Pa. St. 485; 15 Atl.

Rep. 569; *Brothers* v. *Hurdle*, 10 Ired. 490; *Branch* v. *Morrison*, 5 Jones (N. C.) 16; Id. 6 Jones (N. C.) 16; *Halleck* v. *Mixer*, 16 Cal. 574; *Page* v. *Fowler*, 28 Cal. 605.

The reason given for these decisions is that, under the circumstances stated, the title to the realty is put directly in issue between the parties, and it is the policy of the law that such direct issue should be tried in a local action, while great inconvenience would follow if it might be raised in transitory actions. So long as the owner is disseized by the adverse possession of another he must resort to his legal remedy to recover the principal thing,—the possession of the land; and he cannot be permitted to institute separate suits for every act of his adversary which is merely incidental to that possession. When he recovers possession by ejectment then in a single suit he may recover also damages for all that he lost by being deprived of the possession.

The rule seems to rest upon sound principle and to be practicable. We think it should be followed. Consequently the offer of the defendant to show actual, adverse possession of the mine under a claim of right should have been allowed.

It is unnecessary to consider the other assignments of error.

The judgment below must be reversed, and a venire de novo awarded.

DEPUE, J., and BEASLEY, C. J., filed opinions, concurringly specially. 55 N. J. Law 358.

RELIANCE COAL & COKE CO. v. KENTUCKY COAL & COKE CO.

(93 Tennessee 191; 23 S. W. 1095. Supreme Court. Sept. 16,1893.)

[1]**Inconvenience not necessity.** A lease of coal lands reserved to the lessor and his assigns the joint use of such portions of the leased lands as might be necessary for roads, railways, waterways, side tracks, and other structures necessary for the profitable working of adjacent coal lands of the lessor and his assigns, but not so as to injuriously interfere with the workings of the lessee. *Held*, that the lessee might enjoin the making of an entry through and under his land for the purpose of mining coal on adjacent leased land, where the weight of evidence showed that the coal in the adjacent lands could be mined profitably without such entry, though not so profitably or so conveniently as with it.

Underground access not reserved. The reservation as to "roads, railways, waterways, side tracks, and other structures" related to surface ways for ingress and egress to the surface of the adjacent land, and did not embrace underground entries through complainant's leased land.

Subsequent leases not considered. The language of complainant's lease could not be enlarged or altered by the grant in a subsequent lease, of adjoining land, of all such rights of making entries and erecting structures for mining purposes under, through, or upon complainant's leased land as the lessor was competent to grant, since the lessor could grant no rights over complainant's land, except in strict conformity with the reservations of complainant's lease.

Exclusive use—not joint use. A reservation in a lease of coal lands, retaining to the lessor or its assigns the joint use with the lessee of all such portions of the land as may be necessary for roads, tracks, or structures for the profitable working of other lands in the vicinity, does not authorize a structure designed for the exclusive use of the lessor's assigns.

Appeal from Chancery Court, Claiborne County; JOHN P. SMITH, Chancellor.

[1]Grantee of the coal can use the space it occupied as right of way to carry other coal. *Lillibridge* v. *Lackawanna Co.* 17 M. R. 412.

A coal lease gave lessee the right to abandon if mining became impracticable. The same instrument gave him the right of way to carry coal from adjoining lands and the use of other land, to erect buildings, for a separate rental. *Held*, that by ceasing to mine he did not surrender his rights of way and surface rights. *Stewart* v. *Northwestern Coal Co.* 147 Pa. 612; 23 Atl. 882.

Bill by the Reliance Coal & Coke Company to enjoin the Kentucky Coal & Coke Company from opening entries on defendant's land, and from committing further trespasses thereon, and for an accounting. From a decree for defendant, complainant appeals. Reversed.

H. M. CARR and G. W. SAULSBERRY, for appellant.

JESSE L. ROGERS, for appellee.

WILKES, J. Complainant and defendant are lessees from the American Association, Limited, of adjoining tracts of coal land in Claiborne County; complainant's lease being of date August 8, 1891, and covering what is called in the record "Lease No. 7," while defendant's lease is dated September 29, 1891, and covers what is called "Lease No. 9."

The lease to complainant provides, among other things, that it shall have the exclusive right and privilege of mining coal upon the property leased, and that it shall at all times during the lease peaceably and quietly hold and enjoy the premises leased, without any let or hinderance from the lessor or its assigns, or any other persons lawfully claiming the same, or any part thereof. It also provides for a minimum royalty or dead rental of $5,000 per year for each year after the first, or a minimum annual rental of $10 per acre, and covers about 500 acres of ground.

The fourth paragraph of the lease contains this language: "Said first party [meaning lessor] retains and reserves the right * * * to build and construct houses, roads, railways, tramways, quarries, brick works, saw-mills, or other works or improvements, or to farm thereon, all land not used or required by the second party for its works, which work is to have first consideration and preference."

The fifth clause contains: "The party of the first part [to wit, the lessor] retains the right, for itself or its assigns, to the joint

use, during the continuance of this lease, of all such portions of the above-described lands as may be necessary for roads, railways, water-ways, side tracks, and other structures necessary for the profitable working of other lands of the party of the first part, or its assigns, in the vicinity of the above-leased premises, but not to injuriously interfere with the working of the party of the second part," etc.

In the lease to defendant of lot No. 9, these words of conveyance are also used, to wit: "All such rights as making entries and erecting structures for mining purposes under, through, and upon the premises adjoining the above, known as 'Lease No. 7,' as the party of the first part is competent to grant."

On the property leased by complainant, defendant began opening an entry through and under the surface; also began the construction of a side track at the opening of the entry, about 500 feet in length, and is proposing to erect a tipple and coal chute for the purpose of loading its coal into cars at the opening of the entry; and was cutting timber and removing coal from the premises of complainant—whereupon this bill was filed to enjoin defendant from the further opening of entries, and the commission of any further trespasses, and from disposing of the coal taken out of the entry, and for an account.

Defendant admits that it had commenced to open the entry, as stated, along the coal seam on complainant's property; that it intended to make an entry 16 feet wide for the distance of 100 feet, and then drive a cross entry at right angles, 9 feet wide, until it reached its own premises, and that in so doing it was taking the coal out of the entry, as it progressed, just as it would dirt, stone, or any other material obstructing the way; and it claimed the right to do this under the clauses of the leases heretofore set out.

On the trial of the cause, after much proof was taken, the chancellor held that the complainant was entitled to no re-

lief; that the defendant had the right to make necessary roads, railways, water-ways, side tracks, or other structures over or through the tract of land leased to complainant, necessary for the profitable working of the lands leased to the defendant, but so as to not injuriously affect or interfere with the working of complainant on its leased premises.

The court further found and decreed that such way as defendant was making through complainant's land was necessary for the working, profitably, of the coal on defendant's land, and that said way, as well as the side track that the defendant was constructing at its entry at the time of the filing of the bill in this case, would not injuriously interfere with the working of the complainant on its premises. The injunction was thereupon dissolved, and defendant was permitted to proceed with its work, under the direction of the court, and complainant was taxed with the costs. From this decree complainant appealed, and has assigned errors.

First, that the chancellor erred in finding that the way, as defendant was making the same, through complainant's lease, was necessary for the profitable working of the coal on defendant's lease.

Upon this question of fact, the proof is very conflicting, and the contention of each party is well sustained by the testimony of mining and engineering experts. After a careful examination of the entire testimony, we are of opinion the chancellor is not sustained by the weight of the testimony. Under the proof, it is apparent that the opening of the way, as proposed by defendant, would be very advantageous to it, and that by the use of such way its property could be more profitably, easily and conveniently worked but we are not convinced that such way is necessary for the profitable working of the coal on defendant's premises, in the sense that no other way is open for its profitable operation, but the weight of testimony is that the coal on defendant's leased premises may be profitably, but not so con-

veniently, worked, without making use of this way. We consider this established by the testimony of Jackson, Dickson, Park, and, to some extent, conceded by defendant and its witnesses.

The second assignment is that the chancellor erred in finding that the way, as the same was being opened by defendant, through complainant's lease, together with the side track that defendant was constructing at its entry, would not injuriously interfere with the working of complainant's premises.

Upon this question of fact, there is likewise great conflict of apparently reliable testimony; and it is remarkable, that competent, reliable, intelligent witnesses—many of them experts, with large experience and ample opportunities for knowledge, should differ so widely from each other. We are fully satisfied, however, that the entry proposed to be made and the side tracks proposed to be laid, and the tipple, chute, and other appurtenances of the mining plant proposed to be erected and built on complainant's premises by the defendant would materially interfere with, damage, and injure complainant in its rights under its lease, by occupying one of the most eligible sites on its lease, to its own exclusion, by taking out coal from complainant's premises, which it has the right to mine; by erecting structures and a mining plant for defendant's use on complainant's land, to the exclusion and prejudice of complainant in erecting a similar plant.

The third assignment of error is that the chancellor erred in holding that defendant had the right to make necessary roads, railways, water-ways, side tracks, or other structures over or through complainant's premises.

This assignment involves the proper construction of the provisions of the two leases, portions of which have been heretofore set out. While we may look to the language used in the lease to defendant to ascertain its rights as against its lessor, it is evident that, being of later date than complainant's lease, it cannot prejudice the same.

It will be observed that only the fifth clause of the lease relates to the reservation made in favor of the lessor or its assigns in regard to contiguous property; clause No. 4 relating to such reservations as were made to the lessor in the premises therein leased—the latter relating to the premises leased, and the former to premises in the vicinity of that leased.

Looking to the language of this clause, we are of opinion that it relates only to such surface ways over the leased premises as are necessary for the purpose of ingress and egress to the surface of other properties adjacent or in the vicinity, and does not relate to or embrace underground entries through the leased premises; and the term "railways, water-ways, side tracks, and other structures necessary for the profitable working of other lands in the vicinity," means such surface ways and structures as are necessary for such ingress and egress.

To hold that, under this language, underground entries could be made by defendant on complainant's premises, and underground ways could be cut through the coal under its surface, and that tipples, chutes, and other conveniences of a mining plant could be established on complainant's land would be to subject it to such a servitude as would greatly damage, if not totally destroy its value. If this were so and complainant's premises were favorably located, then it would follow that entries could be run under its surface in every direction that might be beneficial to other properties in the vicinity, and it might be made the common center of mining plants for all the property in its vicinity, to the great damage or utter destruction of complainant's rights under its lease. Such incumbrances and servitude cannot arise unless they are expressly provided for, and reservations to that extent are made in plain, unambiguous terms. Such rights do not arise in favor of contiguous land owners by implication of law, and such ways are not ways of necessity, and the question

is not one of convenience, but one of necessity. *Pearne* v. *Manufacturing Co.* 90 Tenn. 629; 18 S. W. 402.

For the same reason, and upon the same grounds, the fourth assignment of errors is well made, and must be sustained. This assignment is that the chancellor erred in finding that the entries, side tracks, tipples, and other structures in process of erection by defendant on complainant's lease, came within the reservation clause in complainant's lease providing for roads, railways, water-ways, side tracks, and other structures, as therein specified.

This language in complainant's lease cannot be enlarged, or in any wise altered by that put in the lease to defendant, to wit: "That the defendant should have all such rights of making entries and erecting structures for mining purposes under, through, or upon the premises of complainant as the lessor was competent to grant."

The lessor could grant no rights over complainant's premises other than in strict conformity with the reservations made in complainant's lease.

Again, the reservation under the fifth clause retains the right to the lessor or its assigns to the joint use of all such portions of the lands as may be necessary for roads, railways, water-ways, side tracks, and other structures necessary for the profitable working of other lands in the vicinity, etc. There is no reservation of any way, track, structure, or road to be used exclusively by an owner of other property, but the reservation is only for the joint use of such owner and complainant. It will hardly be contended that the entry proposed to be made by defendant under complainant's land, and the side track and mining plant intended to be built by it, are intended for the joint use of itself and complainant, but they are designed for defendant's exclusive use, and are not authorized under the reservations in complainant's lease.

It follows that the chancellor was in error in refusing relief

to complainant, and his decree is reversed, and the injunction prayed in the court below will be made perpetual. Defendant will pay the costs of this and the lower court, and the cause is remanded for an account of the coal mined, timber cut, and waste committed on complainant's premises by defendant.

W. H. BOOK ET AL. v. JUSTICE MINING CO.

(58 Federal 106. Circuit Court, District of Nevada. Sept. 18, 1893.)

[1]**Marking location.** The location of a vein or lode, under the mining laws of the United States, is made by taking up a piece of land in the form of a parallelogram, not exceeding 1,500 feet in length and 600 feet in width, 300 feet on each side of the middle of the vein at the surface. The location must be distinctly marked on the ground, so that its boundaries can be readily traced.

Character and condition of ground. The question as to the sufficiency of the marking of the boundaries depends to some extent upon the character and condition of the ground located. Where the location is made upon a comparatively barren hillside, the posting of stakes at each of the four corners of the location, either by driving the stakes into the ground, or building of stone monuments so as to keep the stakes in place, is a sufficient compliance with the provisions of the law.

Removal of stakes after right vested. When the location is marked so that its boundaries can be readily traced, the locator's right of possession becomes fully vested, and cannot be divested by the removal or obliteration of the stakes, monuments, or notice, without the act or fault of the locator, if he performs the other acts required by law.

Location without posting notice. The mining laws of the United States do not require any written notice to be posted upon the location when made, and, in the absence of any local rule or regulation or state law requiring a notice to be posted, the location, the boundaries of which are properly marked upon the ground, is valid without the posting of any notice.

[2]**Location notice liberally construed.** Where the statutes of the state, or local rules and regulations of miners, require notice to be posted upon the ground at the time the location is made, the construction given to the notices should be liberal, not technical.

Mistaken call corrected by the stakes. A mistake in the notice as to the direction and course, being "northerly" instead of "northeasterly," does not invalidate the location. Positive exactness as to the course is not required. The stakes and monuments referred to in the notice, and posted upon the ground, will control the direction stated in the notice.

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[1]*North Noonday Co.* v. *Orient Co.* 9 M. R. 530.
Anthony v. *Jillson*, 16 M. R. 26.
[2]*Wells* v. *Davis*, 22 Utah 322; 62 Pac. 3.
McCann v. *McMillan*, 129 Cal. 350; 62 Pac. 31.

Tying to another mining claim. When a notice of location is recorded, it must contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim. A reference to a known mining claim is a sufficient compliance with the law requiring reference to be made to some natural object or permanent monument.

Annual labor—Work outside the claim. The mining laws of the United States require that not less than $100 worth of labor shall be performed or improvements made during each year upon every unpatented location. Labor and improvements, within the meaning of the statute, are deemed to be done upon the location when the labor is performed or improvements made for the express purpose of working, prospecting, or developing the ground embraced in the location. Work done outside of the limits of a mining claim, for the purpose of prospecting or developing it, is as available for holding the claim as if done within the boundaries of the location of the claim.

Work by tunnel to cut the group. The running of a tunnel for the purpose of prospecting, developing, and working of two separate and distinct mining claims owned by the same person is to be credited to both of said claims, and, if the necessary amount of work is done, it is deemed a sufficient compliance with the law; and the owner is not in such a case, required to also perform work on the surface of the locations, in order to hold the same.

Failure to file affidavit of labor. In construing the act requiring owners of mining claims to make affidavits as to the amount of work done, and to have the same recorded, (St. Nev. 1887, p. 136,) *Held*, that the object of the act was to prescribe a definite way in which the proof of the performance of the work might be obtained, that the act was not intended to prevent the owner from making the proof in any other way, that it simply makes the record prima facie evidence of the facts therein stated, that a failure to comply with the terms of the act does not work a forfeiture, and that a forfeiture of a mining claim can only be established by clear and convincing proof of the failure of the owner to comply with the provisions of the law as to the amount of work required to be done.

Locations in names of individuals for benefit of corporation.—Work done by corporation before obtaining legal title inures to the benefit of the locations. Defendant is a California corporation engaged in mining in the state of Nevada, and on the 2d day of January, 1888, was the owner of the Justice claim—a patented location. The locators of the West Justice and James G. Blaine locations, on that day, while in the employ of the corporation, made the locations in their own names at the expense of, and for the benefit of, the corporation. The Justice, West Justice, and James G. Blaine are contiguous to each other.

The corporation annually performed work by running tunnels from the Justice claim for the purpose of prospecting and developing the mining ground embraced within the locations of the West Justice and James G. Blaine. (See opinion as to the facts.) The locators of these claims did not convey the title to the corporation until the 29th day of November, 1892. *Held*, that the locations made for the benefit of the corporation were valid; that the work performed by the corporation in running the tunnels should be credited as work done upon the West Justice and James G. Blaine; and that the work so done and performed, being sufficient in value, constituted a compliance with the mining laws.

When a mining location is made by one person in his own name, at the request and expense of, and for the benefit of, another person, such other person is legally entitled to the possession of the mining ground so located. The locator, in such a case, holds the legal title in trust for the benefit of the person at whose expense the location was made.

Statute of frauds not applicable. *Held*, that the statute of frauds had no application to the facts of this case; that, the locators of the ground having voluntarily conveyed the title to the corporation, no objection could be urged by strangers to the transaction on the ground that the original agreement as to the location of the claims was not in writing.

Discovery of lode, What constitutes. Any discovery of quartz or other rock in place, bearing gold, silver, or any of the precious metals or valuable deposits specified in the first clause of section 2320, Rev. St. U. S., constitutes a "discovery of a vein or lode," within the meaning of those words as used in the last clause of said section, which declares that "no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located."

[1]**Discovery in rock in place—Value of mineral not material.** The statute was intended to apply to any kind of a vein or lode of quartz or other rock in place, bearing mineral, in whatever kind, character, or formation the mineral might be found. The statutes should be so construed as to protect locators of mining claims who have discovered rock in place, bearing any of the precious metals named therein in sufficient quantity to induce them to expend their time and money in prospecting and developing the ground located. When the locator finds the rock in place, containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants a location of a mining claim to be made.

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[1] *Waterloo Co.* v. *Doe*, 17 M. R. 586. *Jones* v. *Prospect Mt. Co.* 17 M. R. 530.

Pay ore not essential.—Expert testimony. The value of the testimony of experts as to what constitutes a vein or lode depends to a great extent upon the strength or weakness of the reasons given in support of the conclusions reached. An expert witness testified that he would not call any discovery of rock bearing mineral a vein or lode, unless gold or silver was found in sufficient quantities to pay all the expenses of extracting, removing, and milling the ore therefrom, and leave a profit to the owner. *Held*, that the statute is not susceptible of any such construction.

"Vein or lode" defined—Authorities Reviewed. The words "vein or lode," as used in the United States statutes, and as understood by miners, are applicable to any body or belt of mineralized rock lying within clearly-defined boundaries, separating it from the country, or nonmineral rock. Authorities as to the definition of "lodes or veins" reviewed at length, and the consideration, weight and application thereof stated. (See opinion.)

Lode or no lode a question of fact. It is always a question of fact, to be determined by a jury, or by the court, if the case is tried without a jury, whether a vein or lode has been discovered or exists within the limits of the location in controversy, and also as to the continuity of ore and mineral matter constituting the length, width, and extent of any particular vein or lode.

Smaller seam in larger zone. The facts of this case as to the character of the yellow porphyry rock wherein the vein matter is found, and the purple prophyry rock by which it is bounded, reviewed at length. *Held*, that the preponderance of the evidence shows that within this belt of yellow porphyry are numerous seams, crevices, fissures, and deposits where the quartz rock and decomposed rock and matter are found, containing mineral sufficiently diffused to justify miners in giving to the yellow porphyry the general designation of "mineralized matter,—metal-bearing rock."

[4]**Fact of previous discovery.** It is not necessary that the locator of a mining claim should be the first discoverer of a vein or lode, in order to make a valid location. It is sufficient if it be clearly shown that the locator knew at the time of making his location that there had been a discovery of a vein or lode within the limits of his location.

Priority of rights—No question as to cross veins. The West Justice and Blaine locations being prior in point of time, and the locators and owner thereof having complied with the mining laws, it necessarily follows that the location of the Peerless within the limits of said locations is entirely null and void, and no question as to its being a cross vein can be considered.

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[4]*Hayes* v. *Lavagnino*, 17 Utah 185; 53 Pac. 1029.
Nevada Co. v. *Home Co.* 98 Fed. 673; 19 M. R.—

When relocation cannot be made. Mining claims are not open to relocation until the rights of the former locator have come to an end. No relocator of a mining claim can avail himself of the mineral in the public land which another has discovered until the prior locator has in fact abandoned the ground, or, under the provisions of the mining law, has forfeited his right thereto.

[1]**Rights of locators to the side veins.** Where a valid discovery and location of a vein is made, and the laws in relation thereto are fully complied with, the locator thereof is not only entitled to the vein or lode discovered by him, but every other vein or lode throughout its entire depth, the top or apex of which lies within the surface lines of his claim extended downward vertically, to which no right had attached in favor of other parties at the time his location was made.
(Syllabus by the Court.)

In Equity. Bill by W. H. Book and W. H. Blowey against the Justice Mining Company to quiet title to certain mining locations. Decree for defendant.

ROBERT M. CLARKE, for complainants.

W. E. F. DEAL, for defendant.

HAWLEY, District Judge. This is a suit in equity to quiet the title to certain mining ground situate on Justice hill, in the Gold Hill mining district, Storey County, Nev. Complainants are citizens of the United States, and claim title to the ground in controversy under the Peerless mining location made by them on September 22, 1892. Defendant is a corporation organized and existing under and by virtue of the laws of the State of California, and engaged in the business of mining in Storey County, Nev. It claims title to the ground under and by virtue of the mining locations known as the "West Justice" and "James G. Blaine." These claims were located on the 2d day of January, 1888—the West Justice, by Charles Lyons; and the James G. Blaine by Dennis Harrington and Roger Sheehan. At the time these locations were made, Lyons, Harrington and Sheehan were citi-

[1]*Calhoun Co.* v. *Ajax Co.* 182 U. S. 499; 27 Colo. 1.

zens of the United States, and were in the employ of the defendant at the Justice mining claim—a patented location owned by defendant, adjoining the West Justice on the northeast side. These witnesses testify that the locations of the West Justice and James G. Blaine claims were made by them in their own names, for the sole use and benefit of the defendant, at its request and expense. On the 29th of Novem-

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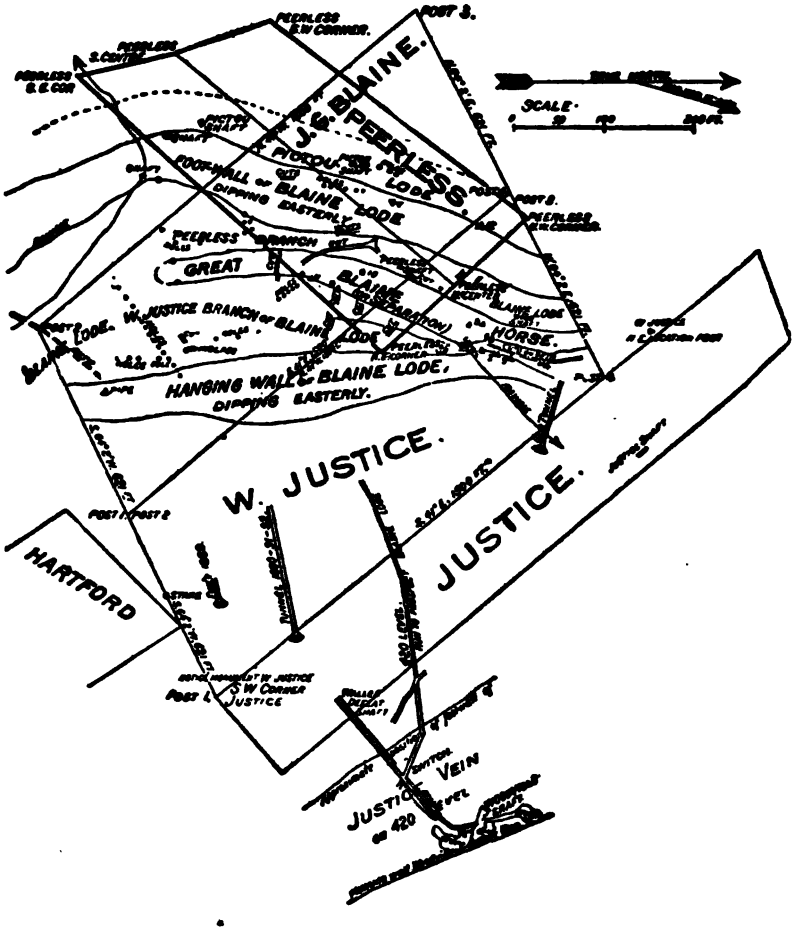
The following is a plat of the locations in question:



ber, 1892, they executed and delivered deeds conveying the ground to defendant. This suit was commenced December 5, 1892. The land in controversy is a part of the public domain, and is known and claimed as mineral land. The Peerless location is valid, if the ground was subject to location at the time it was made. The West Justice and James G. Blaine locations were made long prior in point of time to the Peerless, and, if the locators or owners thereof fully complied with all the essential requirements of the law, the defendant will, of course, be entitled to a decree in its favor.

Complainants contend that both of said locations were and are invalid, and that the defendant never acquired any title thereto. This contention is sought to be maintained upon several separate and distinct grounds, each of which is earnestly contested. The record presents a mass of conflicting testimony upon nearly every vital point in regard to the facts. This seems to be inevitable upon the trial of mining cases. Every judge and "every lawyer at all familiar with the trial of mining cases, where the question of the existence or non-existence of a lode or vein is raised, understands the difficulty that is often—we might say always—encountered in the attempt to ascertain the facts. Practical miners, experts, and men of science are often examined as witnesses, and they frequently differ as much in their statement of facts as in their conclusions of judgment." *Mining Co.* v. *Corcoran*, 15 Nev. 153. The task of ascertaining the truth from such conflicting evidence is by no means an easy one. But, difficult as it is, there are judicial methods of investigation that lead with almost unerring certainty to a satisfactory solution of the disputed questions. Intermingled with the controversies as to the facts, the whole case bristles upon every side with sharp-pointed legal questions, involving the construction that has been, or ought to be, given to the various provisions of the mining laws of the United States; and upon these questions counsel, in their zeal on behalf of their

clients, seem to differ as much as to what the law is as the witnesses do as to the facts.

Under the mining laws of the United States, no valid location of a mining claim can be made until the discovery of a vein or lode within the limits of the claim located. The location of a mining lode or vein is made by taking up a quantity of land in the form of a parallelogram, not exceeding 1,500 feet in length and 600 feet in width, 300 feet on each side of the middle of the vein at the surface. The location of this piece of land must be distinctly marked on the ground, so that its boundaries can be readily traced. When the record of the location of a mining claim is required to be made, it should contain the names of the locators, the date of the location, and such a description of the claim located, by reference to some natural object or permanent monument, as will, with reasonable certainty, identify the claim. Not less than $100 worth of labor must be performed, or improvements made, on the claim during each year.

Did the locators and owners of the West Justice and James G. Blaine locations comply with these provisions of the United States statutes?

1. Were the locations marked upon the ground in such a manner that their boundaries could be readily traced?

It appears from testimony that is undisputed that the ground embraced in these locations had been long previous to January, 1888, located as mining ground by other parties. This fact was publicly known at the time these locations were made. The time for doing the necessary work on the previous locations expired on the morning of the 1st day of January, 1888, which was Sunday. About 1:30 o'clock on Monday morning, January 2, 1888, the ground being covered with snow two feet deep, Lyons, Harrington, and Sheehan went upon Justice hill with a bundle of stakes, 2x4 and 4 feet long, previously prepared, and posted one stake at each of the four corners of the claims, upon which stakes were let-

ters or numbers designating the corner of the claim where the stakes were posted. At places where the stakes could not be driven into the ground through the snow, they built monuments of rock around the stakes to hold them in place. In March or April, 1888, the stakes were renewed at places where they were then missing. The locators at this time also placed a stake near the middle of the southerly or southeasterly end line of the West Justice claim, so as not to encroach upon the Hartford patented claim. Lyons and Harrington testify positively to these facts, and explain with tedious minuteness almost each and every step taken and act done by them—the preparing of the stakes, driving them into the ground, building of stone monuments, measuring the ground with a tape line, placing of written notices on the ground, etc. Upon cross-examination, one of these witnesses testified that the locators of the claims were engaged in this work about 2½ hours. The testimony of these witnesses as to the work done in posting the stakes is not disputed, except upon the imaginable theory that it is incredible that they could have performed the acts testified to by them within the time and in the manner testified to, owing to the fact that the night was dark and cold, the snow deep and the hillside precipitous and rough. This argument is purely technical and critical, and is not based upon any merit whatever. It would, at most, only tend to establish—if it tends to establish anything—that the witness was mistaken as to the length of time it took to do the work. This may be admitted. But the fact remains that the work of posting the stakes was actually done. The testimony of defendant's witnesses upon this point is clear, positive, direct and undisputed. Moreover, the stakes at the southeast corner of the West Justice, and at the end line near the Hartford mine, were found standing, at the time the testimony was taken in this case, where they had been placed by the locators. The stake at the northeast corner of the West Justice was found lying upon

the ground near the place where it had been posted. The stone monuments at the northeast corner of the Blaine and the northwest corner of the West Justice were still in place. It is not to be expected that all of the stakes and monuments would have remained in place, exposed as they were to the winds and rough weather, and liabilities of being torn down and destroyed by either innocent or evil-disposed people, for a period of four years. The fact is that, when the testimony in this case was taken, one of the stakes posted by complainants on the Peerless could not be found. It had disappeared within a few months after the location was made. Could it be claimed that the Peerless location is invalid on that account? Certainly not. Yet the contention of the complainants' counsel, if logically carried out, would apply with as much force to the Peerless as to the West Justice or Blaine locations. The only conclusion that is justified by the evidence is that the stakes and monuments were actually placed upon the corners of each of the locations made on January 2, 1888, and the conclusion is equally inevitable that the locations were so marked that the boundaries thereof could be readily traced. All the authorities agree that any marking on the ground, by stakes, monuments, mounds, and written notices, whereby the boundaries of the location can be readily traced, is sufficient. *Gleeson* v. *Mining Co.* 13 Nev. 442; *Southern Cross M. Co.* v. *Europa M. Co.* 15 Nev. 383; *North Noonday M. Co.* v. *Orient M. Co.* 1 Fed. 523; *Jupiter M. Co.* v. *Bodie C. M. Co.* 11 Fed. 667; *Hauswirth* v. *Butcher*, 4 Mont. 308; 1 Pac. 714; *Upton* v. *Larkin*, 7 Mont. 449; 17 Pac. 728; *Pollard* v. *Shively*, 5 Colo. 309; *Eilers* v. *Boatman*, 3 Utah 159; 2 Pac. 66; *Du Prat* v. *James*, 65 Cal. 555: 4 Pac. 562; *Taylor* v. *Middleton*, 67 Cal. 656; 8 Pac. 594.

The question as to the sufficiency of the stakes and monuments to enable the location to be traced always depends, to a great extent, upon the conformation and condition of the ground located. A location on a hill covered by a dense forest might

require more definite marking than a location on a bald mountain, where the stakes, wherever placed, could be readily seen. Justice hill slopes off in all directions. Purple and yellow porphyry rock is exposed upon the surface in many places, and can readily be seen without making excavations. On other portions of the hill, this rock is covered with loose soil from one inch to a foot or more deep. The whole surface of the hill is dotted over by small bunches of stunted sagebrush, and at and along the summit of the hill, as well as on the sides thereof, any stakes or monuments designating corners or lines of mining locations can readily be seen. No case has been called to my attention where the posting of stakes or building of monuments of the kind, character, and description testified to by the witnesses in this case, at the four corners of the location on the surface, upon a comparatively barren hillside, has not been deemed a sufficient compliance with the law. The Supreme Court of this state has been extremely liberal in its views as to the manner in which mining locations might be marked upon the ground, and be sufficient to comply with the law. *Gleeson* v. *Mining Co. supra.* The law is certainly complied with whenever stakes and monuments are so placed upon the ground that the boundaries of the location can be traced with reasonable certainty, and without any practical difficulty. "The object of the law in requiring the location to be marked on the ground," as was said in the case last cited, "is to fix the claim—to prevent floating or swinging—so that those who in good faith are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated, in order to make their locations upon the residue. We concede that the provisions of the law designed for the attainment of this object are most important and beneficent, and that they ought not to be frittered away by construction. But it must be remembered that the law does not, in express terms, require the boundaries to be marked. It requires the location to be

so marked that its boundaries can be readily traced. Stakes at the corners do not mark the boundaries. They are only a means by which the boundaries may be traced;" but they are sufficient for that purpose. When the location is one sufficiently marked upon the surface, so that its boundaries can be readily traced, and all the other acts of location are performed as required by law, the right of possession becomes fully vested in the locator, and cannot be divested by the removal or obliteration of the stakes, monuments, marks or notices, without the act or fault of the locator, during the time he continues to perform the necessary work upon the claim, and to comply with the law in all other essential respects. *Jupiter M. Co.* v. *Bodie C. M. Co.* 11 Fed. 667; *McEvoy* v. *Hyman*, 25 Fed. 598.

2. Were the notices and record of the West Justice and James G. Blaine defective, uncertain, or insufficient?

The notice of location of the West Justice reads as follows:

"Notice is hereby given that the undersigned has this 2d day of January, 1888, taken up and located fifteen hundred linear feet on this vein of gold and silver quartz, and three hundred feet on each side from the center thereof. This claim begins at this notice and monument, which is the southwest boundary of the Justice Mining Company's claim, and extends fifteen hundred feet in a northerly course, thence six hundred feet in a westerly course, thence fifteen hundred feet in a southerly course, thence six hundred feet to the place of beginning. This claim lies north of the Hartford mine, Gold Hill mining district, Storey county, Nevada. This claim shall be known as the 'West Justice Mine.' Located this 2d day of January, A. D. 1888.

"Charles Lyons, Locator.

"Witness:

"Dennis Harrington.

"Roger Sheehan.

"Filed for record this 4th day of January, 1888, at 30 min. past 9 A. M., at request of locators.

"John Ross, County Recorder.

"Recorded Book D of Mining Locations, p. 81."

The language of the Blaine notice is similar, as to extent of ground claimed, etc. This claim is described as beginning at the southwest boundary of the West Justice, and it

is stated that "this claim lies north of the Ennis mine," and that it shall be known as the "James G. Blaine Mine."

In determining the effect and sufficiency of these notices, it should be borne in mind that the mining laws of the United States do not require any notice to be posted upon the location of a mining claim, when it is made, and there is no provision, anywhere, requiring the notice to be posted in any particular place upon the ground. The locations were valid without any notice of location being placed on the ground. But it is argued that the locations are invalid because notices were posted that did not correctly describe the lode, and because the notices were not posted on the lode. In construing notices of this character, where, under the mining rules and local regulations, or state laws, such notices are required to be posted upon the ground, the courts are naturally inclined to be exceedingly liberal in their construction. Such notices are often drawn by practical miners, unaccustomed to legal forms and technical phraseology; hence, the language used in the notices is often subject to more or less criticism by counsel learned in the law, and engaged in preparing documents in legal shape and form. Then, again, locations are often made without any accurate knowledge of the true course and directions which a compass would readily give, and mistakes in the notice as to the direction and course of the ground located often occur. But such mistakes do not invalidate the location. Positive exactness in such matters should never be required. It is the marking of the location by posts and monuments that determines the particular ground located. Apply these principles to the notices in question. The Justice mining claim was a patented location, with well defined and marked boundaries, when the West Justice and Blaine were located. Now, the notice of location of the West Justice described it as commencing at the "southwest boundary of the Justice Mining Company's claim." If we were to be governed by the notice, there would be no difficulty in

finding the commencement point, but it is said in the notice that the claim extends 1,500 feet in a northerly direction. This is a mistake, so far as the direction is concerned. True north would carry the line over and across the Justice mine, instead of along the southwesterly line of said patented claim, where the stake at the northeast corner of the West Justice was posted. The word "northerly," under such circumstances, conditions, and surroundings should not be interpreted as meaning due north. It includes and may mean any meridian line or course between a due north and northwest, and is defined and made certain by the posting of the stakes or the building of the monuments at the corners of the locations, or along the lines thereof. Such stakes and monuments would control the courses specified in the notice. *Pollard* v. *Shively*, 5 Colo. 309; *Cullacott* v. *Mining Co.* 8 Colo. 179; 6 Pac. 211; *McEvoy* v. *Hyman*, 25 Fed. 596. The mistakes made in the notices as to the courses of the lines are not, in the light of the other facts, sufficient to invalidate the locations. Moreover, the West Justice is described in the notice as being north of the Hartford, which was a patented mining claim, well known and clearly defined. This is held to be a sufficient compliance with the laws of the United States, which require that the record should contain such a description as will identify the claim by reference to some natural object or permanent monument. *Hammer* v. *Milling Co.* 130 U. S. 292; 9 Sup. Ct. R. 548; *Upton* v. *Larkin*, 7 Mont. 449; 17 Pac. 728; *Gamer* v. *Glenn*, 8 Mont. 371; 20 Pac. 654.

The West Justice, notwithstanding the mistake in the notice as to the direction of its lines, was described and staked off in such a manner that it could easily be identified by any prospector or other persons who were desirous of ascertaining the boundaries of the particular ground that had been located. In *Metcalf* v. *Prescott*, 10 Mont. 283; 25 Pac. 1037, the court held that an error in the notice, stating the location

to be in a certain county, when in fact it was in another county, did not vitiate the description, otherwise good.

Further criticism is made as to the wording of the notices claiming 1,500 feet "on this vein," and to the fact that no vein was exposed where the notices were placed. In some states there are laws requiring parties, when making a mining location, to sink a discovery shaft on the lode ten feet or more in depth, and to post a notice thereon, but there is no such law in this state. While the lode within the limits of the boundaries of the location is the principal thing that the locator desires to claim, the law does not demand a marking of the lode. It is the surface land which is to be marked and described, and the notices must be read and interpreted with reference to this law. What is here said disposes of the further objection specifically urged by counsel, that the notices were not placed within reasonable proximity to the lode.

All that has been said about the West Justice is equally applicable to the Blaine notice. The various objections urged to the notices do not affect the validity of either location.

3. Was the annual assessment work done upon the West Justice and James G. Blaine locations?

The testimony shows that the defendant, in May, 1888, commenced work, running a tunnel from the Woodville shaft at a point about 280 feet west of south from the Justice shaft, for the purpose of developing the vein or lodes contained in the West Justice and Blaine locations. This tunnel was run over 200 feet in the year 1888, at an average expense of about $12 per foot. It was extended in 1889 about 200 feet further, and in 1890, 1891, and 1892 about 100 feet each year. It is 980 feet in length, and, according to the testimony of some of the witnesses, it cost the defendant over $20 per foot to run it. It extends into the West Justice ground over 200 feet beyond the line of the Justice claim. The sole object of running this tunnel, as testified to by defendant's witnesses,

was to prospect the West Justice and Blaine locations. It also appears that another tunnel was run in the West Justice ground a distance of about 35 feet in 1889, at a cost of not less than $250, for the purpose of prospecting both the West Justice and Blaine locations. In 1890 another tunnel, commencing at the southwesterly line of the Justice, was run into the West Justice claim by the defendant, for a like purpose, at an expense that year of over $200. Work upon this tunnel was continued in the year 1891 at an expense of over $200, and in 1892 a like amount was expended in extending it. The testimony clearly shows that the running of these tunnels was a practical way to work and prospect the West Justice and Blaine locations. Labor and improvements, within the meaning of the statute, are deemed to be done on a mining claim or lode, whether it consists of one location or several locations, owned by the same party and contiguous to each other, when the labor is performed or improvements made for the purpose of working, prospecting, and developing the ground embraced in the location or locations. The running of a tunnel is often the best means of developing a lode or vein, and extracting the ore and mineral therefrom, and it is not of infrequent occurrence that such tunnels commence at the slope of a hill on the surface ground outside the surface location of a mining claim. When such work is done for the avowed and express purpose of prospecting two or more claims held in common, as was the case here, the courts have always held that such work was to be credited to such claims. This is always deemed to be a sufficient compliance with the provisions of the mining laws of the United States. *Smelting Co.* v. *Kemp*, 104 U. S. 636; *Jackson* v. *Roby*, 109 U. S. 440; 3 Sup. Ct. R. 301; *Chambers* v. *Harrington*, 111 U. S. 350; 4 Sup. Ct. R. 428. Work done outside of the limits of a claim, for the purpose of prospecting or developing it, is as available for holding the claim as if done within the boundaries of the claim itself. *Mining Co.* v. *Callison*, 5 Sawy. 440; *Harrington*

v. *Chambers*, 3 Utah 109; 1 Pac. 362; *U. S.* v. *Mining Co.* 24 Fed. 568. Section 2324 of the Revised Statutes is conclusive of this question. This section was amended February 11, 1875, "so that where a person or company has or may run a tunnel for the purpose of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act." In the light of this statute, and of the evidence in this case, the contention of complainants, that the Blaine location was invalid because no assessment work was done within the limits of the location, is shown to be absolutely untenable.

The next objection urged by complainants, upon this branch of the case, is that both the West Justice and Blaine locations are invalid because the assessment work was not recorded as required by the laws of this state. The section of the law relied upon reads as follows:

"Sec. 2. Within thirty days after the performance of labor or making of improvements, required by law to be annually performed or made, upon any lode or mining claim, the person in whose behalf such labor was performed or improvements made, or some one in his behalf, shall make before, and record with, the mining recorder of the district wherein such claim is situated, an affidavit setting forth the amount of money expended, or value of labor performed or improvements made, or both, the character of expenditures, labor or improvements, a description of the claim or part of claim, affected by such expenditures, or labor or improvements, for what year, and the names of the owners or claimants of said claim, at whose expense the same was made or performed. Such affidavit, or a copy thereof, duly certified by the recorder, shall be prima facie evidence of the performance of such labor, or the making of such improvements, or both." St. Nev. 1887, p. 136.

The object of this act was evidently to fix some definite way in which the proof as to the performance of the work or expenses incurred in the making of improvements might be, in many cases, more accessible. In all mining commu-

nities there is liable to be some difficulty in finding the men who actually performed the labor or made the improvements, and procuring their testimony, in order to establish the facts necessary to show a compliance with the mining law in this respect. The act was passed, as expressed in the title, "for the better preservation of titles to mining claims." Locators of mining claims would doubtless often save much time and trouble, as well as hardship, inconvenience and expense, by complying with the provisions of this act; but the act does not prevent, and was not intended to prohibit, the owner of a mining claim from making the necessary proof in any other manner, nor does it prohibit the contesting party from contradicting the facts stated in the affidavit. It simply makes the record prima facie evidence of the facts therein stated. In *Coleman* v. *Curtis*, (Mont.) 30 Pac. Rep. 266, the Supreme Court, referring to a statute of that state similar to the one here quoted, said that the statute "relates, not to the effect of doing the work or making the improvements, as required by law, but to the method of preserving prima facie evidence of the fact that such requirement has been fulfilled." See, also, *McGinnis* v. *Egbert*, 8 Colo. 41; 5 Pac. 652. There is no provision in the statute to the effect that a failure to comply with its terms will work a forfeiture, and the statute is not susceptible of any such construction. Forfeiture of a mining claim cannot be established except upon clear and convincing proof of the failure of the locators or owners of the claim to have the work done or improvements made to the amount required by law. *Hammer* v. *Milling Co.* 130 U. S. 292; 9 Sup. Ct. R. 548.

Objection is further made to the work done in this case upon the ground that the defendant is not in a position to avail itself of the proofs, because it is not shown that the locators did the work, and, further, because it affirmatively appears that the defendant did not have the legal title to the claims when the work was done, and was not a resident of

this state. When a location is made by one person, in his own name, at the expense of, for the benefit and on behalf of, another person, such other person is certainly entitled to the ground so located. There is no law which prohibits a citizen of the United States, who is a resident of another state, from taking up and locating mining claims in this state in his own name, or from employing citizens and residents of this state to locate claims in their own names for the benefit of such non-residents. The defendant, it is true, is a foreign corporation. In the eye of the law, it is a resident of the state of California. Under the laws of this state, any non-resident person or corporation "may take, hold and enjoy any real property, or any interest in lands, tenements, or hereditaments within the state of Nevada, as fully, freely, and upon the same terms and conditions as any resident, citizen, person, or domestic corporation." Gen. St. § 2655. Another statute of this state provides that all corporations formed under the laws of Nevada for the purpose of mining "shall have power to purchase and hold such mining property as they may deem meet." Gen. St. § 279.

The statute of frauds, (Gen. St. Nev. § 2624,) relied upon by complainants, has no application whatever to the facts of this case. An oral agreement to locate a mining claim for the benefit of another need not be in writing. If a party, in pursuance of such an understanding, at the expense of another, locates the claim in his own name, he holds the legal title to the ground in trust for the benefit of the party for whom the location was made; and such party could, upon making the necessary proofs, compel the locator of the mining claim to convey the title thereof to him, although the agreement so to do was not in writing. This familiar principle has been often applied in cases where a party has entered into an oral agreement to locate mining ground for the joint benefit of himself and others, and makes a location in his own name. It has always been held that such oral agreements

are not within the statute of frauds. *Gore* v. *McBrayer*, 18 Cal. 582; *Moritz* v. *Lavelle*, 77 Cal. 10; 18 Pac. 803; *Hirbour* v. *Reeding*, 3 Mont. 13; *Welland* v. *Huber*, 8 Nev. 203.

But in any event this question only affects the parties to the agreement, and it is difficult to see how strangers to the transaction could urge the statute of frauds, when the parties in interest had fully and voluntarily complied with their agreement by conveying the title to the party for whose benefit the locations were made. The statement is made in complainant's brief that:

"The truth is, defendant hunted up and purchased the pretended title of Harrington and Sheehan after the Peerless lode was discovered, and, by means of this title, is attempting to deprive complainants of their mine by means of the false pretenses that the location was made for the Justice Company, and that work done by the Justice Company in its workings was intended for the Blaine location."

The record does not bear out this assertion. It shows the truth to be, as before stated, that the locations were made for the benefit of defendant, that the work in running the tunnels was done at the expense of defendant, that the sole object and only purpose of running the tunnels was to develop the mining lodes and veins within the limits of the West Justice and Blaine locations, and that such object and purpose were publicly made known at the time the work was done.

4. Did the locators of the West Justice and James G. Blaine discover any vein or lode of quartz or other rock in place, bearing gold or silver, within the limits of their locations, prior to the location of the Peerless claim? This is the most important question in this case. It is one upon which fair-minded men might honestly differ. Credible witnesses, of equal knowledge, character, experience, and judgment, have honestly expressed a difference of opinion in regard to it. It now devolves upon the court, without the aid of a jury, or the presence of the witnesses, to deter-

mine where, and upon which side, the weight of the evidence is found.

What constitutes a discovery of a vein or lode, within the meaning of the statute? Section 2320, Rev. St., provides that—

"Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of their location. A mining claim located after the tenth day of May, 1872, whether located by one or more persons, may equal, but shall not exceed, 1,500 feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

The words "vein or lode," in the last clause of this statute, were evidently intended to apply to such "veins or lodes" as were described in the first section, and to have the same meaning, viz. a vein or lode "of quartz or other rock in place bearing gold, silver," etc. This statute was intended to be liberal and broad enough to apply to any kind of a lode or vein of quartz or other rock bearing mineral, in whatever kind, character, or formation the mineral might be found. It should be so construed as to protect locators of mining claims, who have discovered rock in place, bearing any of the precious metals named therein, sufficient to justify the locators in expending their time and money in prospecting and developing the ground located. It must be borne in mind that the veins and lodes are not always of the same character. In some mining districts the veins, lodes, and ore deposits are so well and clearly defined as to avoid any questions being raised. In other localities the mineral is found in seams, narrow crevices, cracks, or fissures in the earth, the precise extent and character of which cannot be fully ascertained until expensive explorations are made, and the continuity of the ore and existence of the rock in place, bearing mineral, is established. It never was intended that

the locator of a mining claim must determine all these facts before he would be entitled, under the law, to make a valid location. Every vein or lode is liable to have barren spots and narrow places, as well as rich chimneys and pay chutes, or large deposits of valuable ore. When the locator finds rock in place, containing mineral, he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim.

Numerous references have been made by the respective counsel to the works of scientists as to the origin of ore deposits, the character of mineral formations, and the causes thereof. Le Conte's Elements of Geology, 205, 207, 220, 225, 228, 235, 236; Phillips on Ore Deposits, 18, 19, 32, 35, 74, 76 et seq.; Von Cotta's Treatise on Ore Deposits, 26, 27, 34, 35, 69, 70,—which have been examined. Various courts have at different times given a definition of what constitutes a vein or lode, within the meaning of the act of congress; but the definitions that have been given, as a general rule, apply to the peculiar character and formation of the ore deposits or vein matter, and of the country rock, in the particular district where the claims are located. There is no conflict in the decisions; but the result is that some definitions have been given in some of the states that are not deemed applicable to the conditions and surroundings of mining districts in other states, or other districts in the same state. The following cases are instructive upon the point, and are here cited. Some of them will be more particularly noticed after the facts of this case are reviewed. *Mining Co.* v. *Corcoran*, 15 Nev. 147; *Eureka Cons. M. Co.* v. *Richmond M. Co.* 4 Sawy. 302; *Mining Co.* v. *Callison*, 5 Sawy. 439; *Jupiter M. Co.* v. *Bodie M. Co.* 7 Sawy. 97; 11 Fed. 666; *North Noonday M. Co.* v. *Orient M. Co.* 1 Fed.

522; *Hyman* v. *Wheeler*, 29 Fed. 347; *Doe* v. *Mining Co.* 54 Fed. 935; *Mining Co.* v. *Cheesman*, 116 U. S. 536; 6 Sup. Ct. R. 481; *Burke* v. *McDonald*, (Idaho,) 29 Pac. 98; *Upton* v. *Larkin*, 7 Mont. 449; 17 Pac. 728; *Mining Co.* v. *Mahler*, 4 Mor. Min. R. 390; *Duggan* v. *Davey*, (Dak.) 26 N. W. 899; *Harrington* v. *Chambers*, 3 Utah 115; 1 Pac. 362; *Armstrong* v. *Lower*, 6 Colo. 393, 581.

What are the facts of this case? The testimony on the part of the complainants is to the effect that the Peerless is a fissure having a regular course in an easterly and westerly direction, from a foot to three feet in width; a crevice in the earth and porphyry rock filled with decomposed quartz and clay; a quartz vein containing gold and silver in valuable quantities; a blind lode having a foot and hanging wall of porphyry rock, well defined. Upon the part of the defendant, Lyons testified that the northwestern part of the West Justice ground had been worked by miners in 1878 and 1879; that he knew that gold and silver bearing rock and earth had been taken out of the cuts that had been made by the miners, who at that time were working upon and claimed the same as mining ground; that prior to making the West Justice location he knew that there was a lode within the boundaries of that location containing gold and silver bearing rock and ore. He described the places where the old workings were, and the open cuts which still exist upon the surface of the ground. He further testified that in 1882, when he was foreman of the Justice mine, he let a contract to four men, and that they took out from the open cuts about $800 in gold and silver ore. Other witnesses corroborate his testimony. Harrington testified that before making the Blaine location he was all over the ground, and examined it closely; that he discovered and found quartz rock in place, bearing mineral, within the limits of the Blaine location; that he found holes that had been sunk seven or eight feet long and six feet deep and three or four feet in width in the ground

in which was quartz rock in place; that there were several holes sunk down below the surface in solid rock, in which streaks of quartz and porphyry were found; and that he saw in some of these holes streaks of quartz a foot wide. Other witnesses corroborated this testimony.

After the commencement of this suit, numerous holes were dug at the instance and expense of defendant, commencing at the northwesterly end of the West Justice, and extending in places to the southwesterly line of the Blaine location, and at other places, over the hill, within the lines of the respective claims. The witnesses who performed this work testify that they traced the yellow porphyry rock all the way from the northerly end of the West Justice to the southwest corner of the Blaine claim; that, whenever they dug holes in the yellow porphyry rock formation, they obtained quartz rock and decomposed matter containing gold and silver, as shown by assays that were made. The testimony of other witnesses is to the effect that the purple porphyry rock constitutes the foot wall of the Blaine lode; that it forms the separation designated on defendant's Map E as the "Great Blaine Horse"; that it also forms the hanging wall of the Blaine lode; that there is a lode formation all the way between the foot and hanging walls, broken only by the Blaine horse. Several practical miners, having no interest in this controversy, testified that from an examination of the old cuts, the Peerless shaft, and the several holes that were sunk by defendant to determine the formation and character of the ground, with knowledge of the fact that samples of the rock and decomposed matter taken therefrom assayed from $1 to $3 and $4, and at one place as high as $20, a ton, and in the old cuts over $100 a ton, they would say that the whole formation of yellow porphyry, as marked on Map E, from the foot wall to the hanging wall of the Blaine lode, is one single, mineralized formation, containing gold and silver bearing quartz rock in place, and con-

stitutes what is known by miners as a "lode"; that there is no difference in the formation where the Peerless shaft is sunk from any other part of the lode where the same decomposed yellow rock with quartz is found; that the ore and vein matter, wherever found upon the hill within the limits of the West Justice and Blaine locations, is of the same kind and character; and that the Peerless is a mere seam or fissure in this formation, the boundaries of which are marked by the purple rock as the hanging wall and foot wall of the Blaine lode.

The conditions which defendant's witnesses testify to in relation to the yellow porphyry rock constituting a lode are denied by the complainant's witnesses in rebuttal. It is also denied by them that the yellow porphyry occurs upon the hill as represented on defendant's Map E. They testify that the purple and yellow porphyry rock is found indiscriminately, in patches and spots, all over the hill, except at the Peerless fissure. The principal expert witness on the part of complainants testified that the rock, yellow and blue, constituting the mass on Justice hill, and particularly of the ground embraced in the locations in controversy, is what is known to geologists and mineralogists as "quartz porphyry"; that the difference in the appearance of the rock is a difference in color, and not of texture; that "the parts which outcrop above the surface, with very few exceptions, are purple in color, with quite a pronounced purple tinge, and the parts which are below the surface, or just at the surface, change gradually from the purple color of the outcropping rock to a bluish color just at the surface; and within a foot or two of the surface, below it, it changes into a reddish or yellowish color. These changes have no dividing line, or anything like that, but are imperceptible, and blending one with the other, the purple color decreasing gradually. The first is bluish, and then bluish and gray yellow, and then yellow." Great reliance is placed upon the testimony of this witness.

His testimony is given from information obtained by reading elementary works on mineralogy and geology, and is to the effect that the yellow porphyry is not a lode, and that all the land on Justice hill, except that part embraced in the Peerless location, should be classed as agricultural, not mineral land. This witness testifies to theories of his own, and states the facts which he claims substantiate his theories. The value of testimony of this character, in controversies of this kind, depends to a great extent upon the strength or weakness of the reasons given in support of the conclusions reached. Just what this witness meant will perhaps be best understood by quoting a few of the many questions and answers upon his cross-examination, as to what he considered was a lode or vein:

"Question. Excluding all the excavations that you have testified about within the boundary lines of the West Justice, Blaine, and Peerless claims, which are laid down upon the maps of the plaintiffs and defendant, what difference, if any, is there presented to the eye between any of the claims? Answer. Over the surface of the West Justice and Blaine claims there is but little difference in the surface appearance, excluding the excavations. I think the surface of the hill is very much the same, outside of the croppings of the rocks. Q. And you have included in that answer all the land embraced within the West Justice, James G. Blaine, and Peerless locations, and including the Peerless location inside of the Blaine? A. Yes, sir. Q. If, as a matter of fact, you had, upon taking samples, and having assays made, and making them yourself,—you had ascertained that that formation contained gold and silver, would you say that that formation constituted a lode? A. I would not, unless it contained gold and silver in sufficient quantities to make it valuable for mining purposes. Q. In ascertaining that fact, would you deduct from the value the actual cost of mining, the actual cost of labor, the actual cost of milling, and the actual cost of all the material used in mining the ore up to the time that the result of the working of your ore had been obtained, leaving a profit for yourself? A. I might. Probably, that would be the proper course to pursue. Q. In your judgment, before you would call that country about which you have testified a lode, would it be necessary for you to find the precious metals of gold and silver in sufficient quantities to pay all the expenses incident to mining, hauling, reduction, etc., and leave a profit besides? A. I would expect it to pay throughout the extent of the rock, over and above expenses. Q. And, until that result was obtained, you would not call it a lode? A. I would not say it was a lode unless I found the metals in it

to pay the cost of mining. * * * I would not call it a lode unless it was sufficiently mineralized to make it pay to work, or else it would be subject to location as agricultural land. * * * Q. Suppose you found a homogeneous formation between defined boundaries, and upon investigation you ascertained the precious metals did not exist in sufficient quantities to pay for mining. Would you say it was a lode? A. I would reject it as a lode. The water of the ocean contains more gold and silver, in proportion, than the rocks of that hill; and yet I don't claim that the ocean is a lode, simply for the reason that it contains more gold and silver than that hill. But it is a fact that the water of the ocean contains more gold and silver, in proportion, than the rocks of the hill in question. * * * Q. Assuming as a fact that the cost of reduction is $5 or $6 a ton, and that the cost of labor is $4 a day, would you not say that the ground embraced in the locations named was not a lode unless gold and silver existed in sufficient quantities to cover at least those expenses? A. I would not say it was a lode unless it produced it in much greater quantity than that. * * * Q. Is it your understanding that, before a man can locate and acquire title to mineral land, he must actually develop a property that will pay the expenses I have named? A. Yes, sir; he has no right to make a location until he traces or develops such a lode by means of a tunnel, shaft, or other workings."

It must be remembered that this is not a controversy between miners, upon one side, and agricultural claimants, on the other, to determine whether the land on Justice hill is more valuable for one purpose than the other; but it is a controversy between miners, to determine which has the title to certain land claimed by both parties as mineral land, and to have the title thereto quieted by a decree of this court. The answers of the witness to the questions asked constitute the keynote to the theory relied upon by complainants to prove that no discovery of a vein or lode had been made within the limits of the West Justice and Blaine locations prior to the location of the Peerless lode. Other witnesses upon the part of the complainants defined what they understood to be a lode substantially to the same effect. If this theory were adopted by the courts, it would invalidate many mining locations. Logically carried out, it would prohibit a miner from making any valid location until he had fully demonstrated that the vein or lode of quartz or other rock in place, bearing gold or silver, which he had

discovered, would pay all the expenses of removing, extracting crushing, and reducing the ore, and leave a profit to the owner. If this view should be sustained, it is manifest that it would lead to absurd, injurious, and unjust results, destructive of the rights of prospectors and miners, in their honest, patient and industrious efforts to explore, discover, and develop the veins and lodes that exist in the public mineral lands of the United States. A vein or lode of quartz or other rock in place, bearing gold and silver, is found upon the side of a hill or mountain. It is within well-defined walls, and the rock assays from $1 to $15 per ton. The cost of extracting, removing, and milling the ore is $20 per ton. The miner making the discovery is aware of this fact, but he knows, or has good reason to believe from his own knowledge, gained by years of experience, that, within or along the veins or lodes of that particular district, places are liable to be found that may prove to be of much greater value, and that the ore is liable to be richer at a greater depth than it is upon the surface. Now, in such a case, can it be reasonably claimed, under the provisions of the mining laws, that the person making the discovery—a discovery which, in good faith, induces him to locate the vein or lode, and to commence the running of a tunnel into the hill or mountain for the purpose of properly working and developing the ground, and complying with all of the provisions of the law, after he has expended thousands of dollars in labor and improvements upon the same—can be deprived of his location by the fact that other persons, subsequent to his discovery and to his location, went upon the hill 500 or 1,000 feet distant from the place where he had found and prospected the lode, but within the limits of his location, and there, by sinking a deeper shaft upon the same lode, found ore which assayed over $40 per ton,—enough to insure a profit to the owners,—and thereupon located the ground? This may be an extreme case, but it fairly illustrates the theory, for,

according to the testimony of some of complainants' witnesses, the latter location would be valid, and the prior location invalid. The act of congress is not susceptible of any such construction. It does not impose any conditions as to the value or extent of the ore. It simply provides that "no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located."

Judge Sawyer, in construing this provision of the statute, correctly instructed the jury in *Jupiter M. Co.* v. *Bodie M. Co.* 11 Fed. 675, that:

"A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz, or with some other kind of rock, in place, carrying gold, silver, or other valuable mineral deposits named in the statute. It is not enough to discover detached pieces of quartz, or mere bunches of quartz not in place. The vein, however, may be very thin, and it may be many feet thick, or thin in places,—almost or quite "pinched out," in miners' phrase,—and in other places widening out into extensive bodies of ore. So also, in places, it may be quite or nearly barren, and at other places immensely rich. It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, * * * within the lines of the claim located, to make a valid location including the vein or lode. It may, and often does, require much time and labor, and great expense, to develop a vein or lode, after discovery and location, sufficiently to determine whether there is a really valuable mine or not, and a location would be necessary, before incurring such expense in developing the vein, to secure to the miner the fruits of his labor and expense in case a rich mine should be developed."

In *Eureka Con. M. Co.* v. *Richmond M. Co. supra*, Mr. Justice Field, in delivering the opinion of the court, discussed this question as to what constituted a lode, at great length, and came to the conclusion—

"That the term, as used in the acts of congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes * * * all deposits of mineral matter found through a mineralized zone or belt, coming from the same source, impressed with the same forms, and appearing to have been created by the same processes."

This definition, where applicable to the facts, has been approved and followed, and is recognized and declared to

be correct by the Supreme Court of the United States in *Mining Co.* v. *Cheesman, supra,* where the court said:

"A body of mineral or mineral-bearing rock, in the general mass of the mountain, so far as it may continue unbroken, and without interruption, may be regarded as a lode, whatever the boundaries may be. * * * With well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode."

Hyman v. *Wheeler, supra,* is to the same effect.

In *Burke* v. *McDonald, supra,* the court held that:

"A lode, within the meaning of the statute, is whatever the miner could follow, and find ore. Under the requirements of the law, a valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following with the expectation of finding ore; and a valid location of a mining claim may be made of a ledge deep in the ground, and appearing at the surface, not in the shape of ore, but in vein matter only."

In some mining districts the country rock is found in broken blocks scattered throughout the vein or mineralized rock constituting what is known and called the "lode." Where the lode or vein is wide, the country rock is occasionally found in large, solid bodies, extending for hundreds of feet in length, and several feet in width, forming what is technically known among miners as a "horse," and in other portions of the lode loose blocks or fragmentary bodies of the country rock will be found commingled, more or less, with the ore bodies of the vein or lode. Even in narrow veins there is liable to be an intrusion of the country rock into the vein, occupying almost its entire width, and sometimes leaving nothing but a narrow seam of clay leading the way for the miner to follow his vein until the country rock disappears, and the ore bodies are found continuing as before. Such conditions in the formation of the country rock, fissures, and ore bodies are often deceptive and misleading. The owners of such veins or lodes are often confronted with different theories, the truth or falsity of which can only be solved by expensive explorations. A practical illustration of these conditions is found in Phillips on Ore

Deposits, p. 35, fig. 11, where the author, in referring to the conditions of the metalliferous veins found in the mining districts of Cornwall, England, says:

"The same lodes, within short distances, often vary considerably in direction, width, and dip, and they frequently split or divide into branches, both in length and in depth. These branches may, or may not, again unite. If, as in Fig. 11, a lode, a, incloses a mass of the country rock, the included fragment, b, is called a 'horse' or 'rider.'"

The definitions of a vein or lode, as given in the authorities, are, as before stated, instructive, and worthy of consideration. Their application to any given case must be determined by reference to the special facts which existed in the particular mining district where the lodes under consideration were located, in connection with the facts of the case before the court. It is always, in every case, a question of fact, to be determined by a court or jury, whether a vein or lode has been discovered or exists within the limits of the particular claim or location in controversy, and also a question of fact as to the continuity of ore and mineral matter constituting the width and extent of any particular lode. In the case of *Eureka Consolidated Min. Co.* v. *Richmond Min. Co.*, the court found the facts to be that a zone of limestone was contained within clearly-defined limits; that it bore unmistakable marks of originating, in all its parts, under the influence of the same creative forces; that it was bounded on the south by a wall of quartzite, and on the north by a belt of clay or shale; that the limestone was found between these limits, and had been broken up, crushed, disintegrated, and fissured in all directions, so as to destroy, to a great extent, all traces of stratification; that throughout this zone of limestone the mineral was found in the numerous fissures of the rock; that the mineral was "sufficiently diffused to justify giving to the limestone the general designation of mineralized matter,—metal-bearing rock." Substituting the words "yellow porphyry" for "limestone," and the words "purple porphyry" for "quartzite" and "clay or shale," and

giving the true course of the hanging and foot walls, and we have substantially the same physical facts concerning the formation of the country on Justice hill as were found in the *Eureka Case.*

Several of the witnesses upon the part of the complainants, who expressed their opinion, as miners, that there was no vein or lode except the Peerless, that had been discovered in the ground in controversy, testified upon cross examination that the entire country from the north boundary of the West Justice and Blaine locations down to the Independent mine,—a distance of more than one mile,—is all of the same character; that mining claims are now, and have been for many years, located and worked in the same kind and character of formation as is found in the West Justice and Blaine locations; that it is just the kind of a country and formation that a prospector would look for and work in; that it is all a mineral belt, where a person is as liable to find ore in one place as in another; that the whole formation of yellow porphyry is more or less mineralized; and that, if the ground was not taken up, they would be inclined to locate it, with the expectation of finding ore that would pay expenses, and return a profit to the owner. Although there are found large blocks of solid, yellow porphyry rock containing no mineral, as is the case with the limestone, in limestone formations, yet in many places the yellow porphyry is broken, crushed, and decomposed, with seams and fissures found in all directions, showing more or less continuity of ore, quartz rock, and mineralized vein matter throughout the entire width of the yellow porphyry belt, giving to it a specific, individual character, and by which it can be distinctly identified, and is separated from the blue or purple porphyry by which it is bounded. Within this belt of yellow porphyry are numerous seams, crevices, fissures, and deposits where the quartz rock and decomposed earth and rock is found, containing mineral sufficiently diffused to justify miners

in giving to the yellow porphyry the general designation of "mineralized matter,—metal-bearing rock."

Guided by the best lights at my command, the decisions of courts as to what constitutes a discovery, the definition of a "vein or lode," within the meaning of the act of congress, and the testimony contained in the record, I am of opinion that the weight of the evidence preponderates in favor of the defendant.

It is an undisputed fact that the locators of the West Justice and Blaine locations were not the original discoverers of the vein or lode, but it is not necessary that the locators should be the first discoverers of a lode, in order to make a valid location. It is sufficient if it is shown that the locators knew at the time of making their locations that there had been a discovery of a vein or lode within the limits of the locations made by them. *Jupiter M. Co.* v. *Bodie M. Co. supra.*

5. The facts of this case do not present any questions as to the rights of the parties under section 2336, Rev. St., with reference to cross veins, as contended for by complainants' counsel. The Peerless is not a cross vein, but it is a part of the Blaine lode, discovered and located within the limits of the Blaine location. Complainants, in making the location, and working upon the Peerless,—notwithstanding the fact that they may have acted in perfect good faith, under the honest belief that the land taken up by them was subject to location,—were trespassers upon the mining ground owned by defendant. It affirmatively appearing that the West Justice and Blaine locations were prior in point of time, and that the locators, and the owner thereof, have in every respect fully complied with the mining laws applicable to said locations, it necessarily follows that the Peerless location, or so much thereof as is within the limits of the West Justice and Blaine locations, is absolutely null and void, and no right or title to the ground in controversy was ob-

tained thereunder. Mining claims are not open to relocation until the rights of the former locator have come to an end. No relocator can avail himself of the mineral in the public land, which another has discovered, until the former discoverer has in fact abandoned the claim, or, under the law, has forfeited his right thereto. As was said in *Belk* v. *Meagher*, 104 U. S. 284:

"The right of location upon the mineral lands of the United States is a privilege granted by congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done."

It is expressly provided in the act of congress that, where the locators of a mining claim have fully complied with all the provisions of the law, they—

"Shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth the top or apex of which lies inside of such surface lines extended downward vertically." Rev. St. U. S. § 2322; *Doe* v. *Mining Co. supra; Duggan* v. *Davey, supra; Mining Co.* v. *Fitzgerald*, 4 Mor. Min. R. 380; *Iron Silver M. Co.* v. *Elgin M. & S. Co.* 118 U. S. 206; 6 Sup. Ct. R. 1177.

This is true in all cases, subject only to the other provisions of the statute, which have no application to this case, reserving to locators of other mining claims the right to follow under the surface of such locations for the purpose of extracting and removing the ore from any vein or lode, the top or apex of which lies within the surface lines of such other location.

It follows from the views herein expressed that the defendant is entitled to a decree in its favor.

It is so ordered.

ALFRED OSCAMP v. THE CRYSTAL RIVER MINING COMPANY.

(58 Federal 293. Circuit Court of Appeals, Eighth Circuit. Oct. 2, 1893.)

Failure by an overlapped senior claim to do its annual labor does not operate to vest title to the overlap in the junior overlapping claim unless the junior claim file a relocation certificate, as allowed by statute of Colorado covering such case.

[1]**Cross lode no right to surface.** The position of the junior locator in such case is not aided by the fact that his location rests upon the discovery of a vein which crosses the vein of the senior location; for, while he may be entitled to work his vein into the senior location, and up to the point of crossing, this does not affect the senior locator's right to the possession of the entire surface of his claim.

Partial recovery in ejectment. In an ejectment suit plaintiff is not ordinarily limited in his recovery to the precise amount specified in his declaration, but may recover a less quantity.

In Error to the Circuit Court of the United States for the District of Colorado.

At Law. Action of ejection brought by Alfred Oscamp against the Crystal River Mining Company. Verdict and judgment for defendant. Plaintiff brings error. Reversed.

L. C. ROCKWELL, for plaintiff in error.

CHARLES J. HUGHES, Jr., for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

[1]*Calhoun Co.* v. *Ajax Co.* 182 U. S. 499; 27 Colo. 1.

An overlapping junior claim does not take its vein within the space of intersection. *Watervale M. Co.* v. *Leach*, 17 M. R. 568; *Wilhelm* v. *Silvester*, 101 Cal. 358; 35 Pac. 997.

A location cannot be made on top of a prior location on the pretext of its being a crossing. *Book* v. *Justice Co.* 17 M. R. 617.

Construction of deed conveying vein afterwards alleged to cross a vein not conveyed. *Stinchfield* v. *Gillis*, 107 Cal. 84; 18 M. R.—

THAYER, District Judge. The question presented by this record appears to be one of first impression, and arises out of the following facts: The plaintiff in error is the owner of an undivided one-third part of the Excelsior No. 1 lode mining claim, hereafter called the "Excelsior Claim," situated in the Elk Mountain mining district, Gunnison County, Colo. The defendant in error is the owner of the Black Queen lode mining claim, hereafter termed the "Black Queen," which is situated in the same district, county, and state. Of these claims the Excelsior is founded upon the earlier location. Both claims are rectangular in shape, and, as originally laid upon the surface of the earth, the north side line of the Black Queen runs diagonally across the southwest corner of the Excelsior Claim, and cuts off from the latter claim a small, triangular piece of ground having an area, as it is said, of about three-quarters of an acre. A suit was brought by the plaintiff in error on July 7, 1890, against the defendant in error in the Circuit Court for the district of Colorado, to recover the triangular parcel of land aforesaid, on the ground that the owners of the Excelsior Claim had the superior title thereto by reason of their older location, and that they had been wrongfully ousted from the possession thereof by the defendant in error. On the trial in the Circuit Court it appeared from an admission made by counsel for the plaintiff that after the Excelsior Claim was located the requisite amount of development work under section 2324 of the Revised Statutes of the United States (to wit, $100 worth of work per year, the claim having been located after May 10, 1872) was done during each of the years 1882 and 1883, that no work was done on the claim during the year 1884, but that the owners re-entered and resumed development work in 1885. When this admission was made, the Circuit Court charged, in substance, that the failure of the owners of the Excelsior Claim to do any development work thereon during the year 1884 made the Black Queen location good as to all of the lands within its side lines and end lines, in-

cluding the triangular piece heretofore mentioned, notwithstanding the fact that the owners of the Excelsior Claim had originally had the superior title to the triangle in question by virtue of their older location. The theory of the Circuit Court seems to have been that, as the owners of the Black Queen continued in possession and at work on their claim during and after the year 1884, while operations on the Excelsior Claim were suspended, and that as the two Claims conflicted and overlapped in the manner before indicated, the failure of the owners of the Excelsior Claim to do any work during the year 1884 was an abandonment of their superior right to the space where the claims overlapped, and that as to such territory the title of the Black Queen became paramount without any affirmative action on the part of its owners, from and after January 1, 1885, and that the relative status was not altered when the Excelsior claimants resumed work during that year. The soundness of that view is challenged by the plaintiff in error, and the action of the Circuit Court in enforcing it in its charge is the error that we have to review.

In *Belk* v. *Meagher*, 104 U. S. 279, 283, it was held, after much consideration, that a mining location, when perfected according to the statutes of the United States and local laws and regulations, "is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent," and that there is nothing in the law under which such property is acquired "which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location than it is for the protection of any other grant from the United States." It was furthermore held in that case that a failure to do the requisite amount of annual development work on a claim under section 2324 of the Revised Statutes of the United States simply renders the claim subject to relocation by third parties, after the lapse of the year, and not before, and

that such right of relocation is itself lost, and the original owner is restored to all of his rights, if he enters without force, and resumes work, before a relocation is perfected by any third party.

It should be further observed that the laws of the state of Colorado contain provisions relative to the relocation in whole or in part of abandoned lodes, and also as to the making and filing of amended location certificates under certain circumstances. These several provisions of the Colorado Statutes (Mills' Ann. St.) are as follows:

"Sec. 3162. The relocation of abandoned lode claims shall be by sinking a new discovery shaft and fixing new boundaries in the same manner as if it were the location of a new claim; or the relocator may sink the original discovery shaft ten feet deeper than it was at the time of abandonment, and erect new, or adopt the old boundaries, renewing the posts if removed or destroyed. In either case a new location stake shall be erected. In any case whether the whole or part of an abandoned claim is taken, the location certificate may state that the whole or any part of the new location is located as abandoned property."

"Sec. 3160. If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law and he shall be desirous of securing the benefits of this act, such locator or his assigns may file an additional certificate subject to the provisions of this act. * * * "

In view of the rights that are thus acquired under the laws of the United States by the owner of a mining claim who has made a valid location, and in view of the foregoing provisions of the Colorado statutes, we are constrained to hold that the owners of the Black Queen did not acquire a superior right to the triangular parcel of land which is the subject of controversy, merely because the owners of the Excelsior Claim failed to do the requisite amount of development work during the year 1884, they having resumed work in the year 1885 prior to the alleged ouster. We are unable to see upon what principle the failure to do such work operated to

extinguish the title of the owners of the Excelsior Claim, and to transfer it to the owners of the Black Queen. In the early days of mining, before the adoption of any laws on the subject of mining locations, there may have been such a thing as a title to a mining claim that was so entirely dependent upon possession that it ceased to exist when actual possession of the claim ceased; but at the present time the title to a well-located mining claim is not of that precarious character, for the reason that it is not exclusively dependent upon possession, but rests upon a statutory grant. As was said in *Belk* v. *Meagher*, *supra*, actual possession is no more necessary to protect the title to a mining claim than it is to protect the title to property acquired under any other grant from the United States. The necessary conclusion seems to be that neither the failure of the owner to occupy or to work his claim during a given year will operate to divest him of his title, and to confer it upon another. A failure to work a claim to the extent required by the statute simply entitles a third party to relocate it in the mode pointed out by existing laws, and, as the statutes of Colorado prescribe the mode in which third parties may divest the title of the original owner by a relocation, if the statutes in that respect are not pursued, the status of all persons remains unaltered barring the possible effect of limitations or laches; and if at any time the original owner re-enters, and resumes work, the right of relocation is then lost.

It is not denied, as we understand, that the views last expressed would be sound if the defendant in error was an ordinary third party seeking to appropriate the plaintiff's claim, but it is suggested that it is not an ordinary third party, against whom the above views would be clearly tenable, for the reason that the Black Queen location rests upon the discovery of a lode which crosses the vein on which the Excelsior location is founded, so that, in any event, and notwithstanding its later location, the owner of the Black Queen

could hold its vein within the disputed triangle, except at the very point of intersection of the two lodes. We are not disposed to controvert the proposition last stated, as it is supported by repeated decisions of the Supreme Court of the state of Colorado. *Branagan* v. *Dulaney*, 8 Colo. 408; 8 Pac. 669; *Lee* v. *Stahl*, 9 Colo. 208; 11 Pac. 77; Id. 13 Colo. 174; 22 Pac. 436. But we fail to see that the circumstance thus invoked places the defendant company in any more favorable attitude with respect to the existing controversy than would be occupied by any third party. The plaintiff in this case is endeavoring to assert his superior right to the surface ground included within the small triangle. He is not seeking, apparently, to recover and to hold the defendant's lode or vein; and, even if he should prevail in this action, the defendant would still retain its cross vein within the triangle, except at the point of intersection of the two veins, together with such right of way for the purpose of taking out mineral as is now accorded to the owners of a cross vein when it passes through an older location. As it is the right to the surface ground lying within the triangle that is now in dispute, we are unable to see that the defendant company can acquire a paramount right thereto as against the owner of the Excelsior Claim, except by taking the same action under existing laws that other persons would be required to take if they desired to appropriate it as abandoned property.

It is further insisted by the plaintiff that the Circuit Court committed another error, to his prejudice, in instructing the jury, in substance, that the plaintiff ought not to recover if it appeared that he was not entitled to the possession of the full quantity of land described in his declaration, to wit, 752-1000 of an acre, although it did appear that he was entitled to recover a triangular piece containing a less area. This assignment of error on the facts disclosed by the present record would seem to be well taken. In a suit in eject-

ment a plaintiff is not ordinarily limited in his recovery to the precise quantity of land specified in his declaration, but may recover a less quantity. We would not, however, be understood as expressing a definite opinion on the last assignment, for the reason that considerations may have been present to the mind of the trial judge which are not disclosed to us by the present record or by the briefs of counsel, which, in the present case, fully justified the instruction complained of. This is a matter which is accordingly left open for reconsideration on a second trial.

For the error in the charge first above indicated the judgment of the Circuit Court is hereby reversed, and the cause is remanded, with directions to award a new trial.

ST. LOUIS MINING & MILLING CO. OF MONTANA v. MONTANA MINING CO., LIMITED, ET AL.

(58 Federal 129. Circuit Court, District of Montana. Oct. 2, 1893.)

Pending suit to try title. In the federal courts an interlocutory injunction may be granted, restraining the mining of valuable ores pending an action at law to determine the legal title, when such title is in dispute. *Erhardt* v. *Boaro*, 5 Sup. Ct. Rep. 565; 113 U. S. 537, followed.

Contest between legal and equitable title. The legal title is not "in dispute," however, within the rule requiring the institution of an action at law, when complainant shows a conveyance from the government patentee, and defendants merely claim under a contract to convey, made by such patentee, which is merely an equitable title; and in such case the court may issue an interlocutory injunction pending the determination of the title by suit in equity.

[1]**Complainant must show point where trespass begins. Apex case.** An injunction will not issue to restrain the removal of ores from disputed ground between mining claims, when neither the bill nor any affidavit or other evidence fixes the point where defendant must stop. The court will not in terms enjoin defendants from working any vein having its apex in complainant's claim, for this would require defendants to ascertain from what acts they are enjoined.

Prospecting not enjoined. The working of disputed mineral ground for purposes of exploration, only, will not be enjoined.

Estoppel by deed. The equitable title acquired by the vendee of lands under a contract to convey cannot work an estoppel to the assertion of the legal title by a third person to whom the vendor has conveyed it.

In Equity. Suit by the St. Louis Mining & Milling Company of Montana against the Montana Mining Company, Limited, Rawlinson T. Bayliss, Alexander Burrell, Joseph Harvey, Isaac Warren, Nicholas Francis, John Jewell, and Thomas Howkins, to enjoin the extraction of ores from ground claimed by complainant. Injunction denied, and restraining order dissolved.

MCCONNELL, CLAYBERG & GUNN and TOOLE & WALLA, for complainant.

CULLEN & TOOLE, for defendants.

[1] *Montana Co.* v. *Boston Co.* 22 Mont. 159; 56 Pac. 120.

KNOWLES, District Judge. Complainant brings this suit for the purpose of enjoining defendants from extracting certain valuable ore, containing gold and silver, from certain mining premises claimed to belong to the St. Louis quartz lode mining claim. The jurisdiction of this court, sitting as a court in equity, is claimed on the ground that the same will prevent a multiplicity of suits. The application at this time is for an interlocutory injunction pending the action, for the purpose of preserving the ore in one certain vein of the lode claim mentioned in the bill, until the final determination of the action. The defendants urge that the court has no jurisdiction of the cause, because the title to the premises in dispute has not as yet been determined at law. Enough facts are stated in the bill to show that the action is of the character which would prevent a multiplicity of actions at law. It is alleged therein "that defendants have entered upon a vein or lode of quartz belonging to complainant, and of which it is in possession, and have extracted valuable ore therefrom; are now so doing, and are threatening to continue the extraction of such ore." This is what is termed a "continued trespass." A continued trespass is said to be of the class of wrongs which will necessitate the instituting of a multiplicity of actions at law. 1 Pom. Eq. Jur. p. 256, § 245.

It is contended, however, that the complainant's title to the vein or lode, which, it is alleged, defendants are trespassing upon, has not as yet been established by an action at law. It is said, generally, when the legal title is in dispute, an injunction will not be granted until the same is established by at least one action at law. 1 Pom. Eq. Jur. p. 264, § 252. This rule is said to be established because courts in equity will not, in general, try the legal title to land. It has been held by the Supreme Court, however, in the case of *Erhardt v. Boaro*, 113 U. S. 537; 5 Sup. Ct. Rep. 565, that the above doctrine "has been greatly modified in modern times, and it

is now a common practice, in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extraction of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though title to the premises be in litigation. The authority of the court is exercised in such cases through its preventive writ to preserve the property from destruction pending legal proceedings for the determination of the title." Perhaps the rule is still that no permanent injunction will be granted in such a case as a continued trespass until the legal title is established in a proceeding at law to determine the same. The above case, however, would settle the rule for this court that pending an acton at law for that purpose, in such cases an interlocutory injunction might issue.

The question arises, is the legal title disputed in this case? for, if it is not, the rule that requires an action at law to be instituted does not apply. "If the plaintiff's title to the subject-matter affected by the wrong is admitted, a court of equity will exercise its jurisdiction at once, and will grant full relief to the plaintiff without compelling him to resort to a prior action at law." 1 Pom. Eq. Jur. § 252.

It will be observed, in the decisions upon this point, it is generally stated that, when the legal title is disputed, an action at law must first be maintained to determine the same before an injunction will be granted. In this case it is not disputed but that complainant claims under a patent from the United States, the source of title. The patent is in evidence in this proceeding, and a deed from Charles F. Mayger, the patentee, to complainant. There is a strip of ground containing about 12,844.50 square feet off of the St. Louis lode mining claim, bounded as follows, to wit:

"Commencing at a point from which the center of the discovery shaft of the Nine Hour lode bears S., 39° 32′ E., said course being at right angles to

the boundary line of the St. Louis lode, between corners 2 & 3, fifty feet distant; thence N., 50° 28′ E., on a line parallel to the aforesaid boundary line of the St. Louis lode claim, between corners 2 & 3, 226 feet, to a point on the boundary line of the St. Louis lode between corners 1 & 2; thence S., 20° 28′ W., along said boundary, between corners 1 & 2, 60.5 feet, to corner No. 2 of St. Louis lode, 400.31 feet, to corner No. 3 of St. Louis lode; thence N., 46° 10′ W., along the line of boundary of St. Louis lode, between corners 3 & 4, 30 feet, to a point; thence N., 50° 28′ E., along a line parallel to the boundary of St. Louis lode, between corners 2 & 3, 230 feet, to point of beginning."

This ground is included in the patent of the said St. Louis lode claim to said Charles F. Mayger. This ground, on the 7th day of March, 1884, the said Mayger contracted to convey to William Robinson, James Huggins, and Frank P. Sterling. The defendant, the Montana Mining Company, Limited, is the assignee of this contract, and claims a right to said premises thereunder. This does not raise any issue as to the legal title to these premises. If it shows any title to the premises, it is an equitable title, and can be made available in a court of equity. If a valid equitable title, in such a court it will constitute as good a defense as a legal one. It is claimed that, should the plaintiff be forced into a court of law to try its legal title, there might be presented the question of estoppel in regard to the assertion thereof. The facts presented up to this time would not be sufficient to present such a question. The authorities cited by defendants upon this point pertain to estoppel in pais. The acts or representations necessary to work such an estoppel are acts or representations clearly made with a knowledge of the facts. The person affected thereby must have been ignorant of the falsity of the same, and must have acted thereon upon the belief that they presented the true condition of the title of the property in controversy. No such a condition of things pertaining to the dispute in this case is presented. There is nothing to show any waiver of the legal title in this case. The equitable title conveyed by the contract cannot work an estoppel to the assertion of the legal title. It is no admission

or declaration contrary to the claim of the legal title. Generally, when one enters upon land under an executory contract of purchase, he is estopped to deny the legal title of the one executing the contract. 7 Amer. & Eng. Enc. Law, p. 27. Generally, an equitable title cannot be interposed as a defense in an action at law. A law court takes no notice of an equitable title. For these reasons I think the legal title in this case is not in dispute, and that the suit was properly instituted in a court of equity. If an injunction will issue pending an action at law, and in aid thereof, when a continued trespass is complained of, I can see no reason for refusing an interlocutory injunction upon the same facts pending an action in equity. The same right to have the property preserved from destruction should exist in one case as well as in the other.

The next question presented is, can the court, under the facts in this case, grant the writ asked? The dispute in this case arises over a vein which crosses on some line from the St. Louis claim to the Nine Hour claim. The exact point where the apex of this vein crosses into the undisputed ground of the Nine Hour lode is not fixed by any affidavit or the bill of complaint. The court cannot, then, designate the exact line beyond which defendants, in working north upon said vein in their ground, must stop. Plaintiff asks the court to enjoin the defendants from working upon or extracting any ore from any vein having its top or apex in the St. Louis ground. This would call upon the defendants to ascertain what veins have their apex in plaintiff's ground, and the extent of such apex therein. "The writ, as a general rule, ought to contain a concise description of the particular acts or things in respect to which the party is enjoined, so that there may be no misapprehension on the subject." *Whipple* v. *Hutchinson*, 4 Blatchf. 190. This rule was expressed in the above case by Justice Nelson. The rule is approved in High, Inj. (1st Ed.) p. 26, § 38. In reason, it ought

not to be left to a defendant to ascertain from what facts he is enjoined. There is probably a dispute as to where the apex of the vein in controversy does cross that line between the St. Louis and Nine Hour claims. Defendant Bayliss, in his affidavit, asserts that he has not mined north of a point where a line drawn parallel to the south end line of the St. Louis claim would cut the point where the vein in dispute probably crosses the line of the Nine Hour lode, except for exploration, and the ore taken out in such exploration has been left in the drift. This is not disputed by any affidavits on the part of plaintiff. There are declarations that defendants have worked in the vein having its apex in the ground in dispute, but not that they have removed the ore therefrom. This is a matter worthy of consideration. A court under such circumstances, ought not to enjoin a party from exploring his premises or the premises in dispute. That is not an irreparable injury. For the reason that the court cannot order a writ showing distinctly the ground from which defendants should be enjoined from taking out ore beneath the surface of the Nine Hour claim, and because it does not fully appear that defendants have been removing any ore to which plaintiff may establish, on the trial, its title, the writ is denied, and the restraining order heretofore issued is hereby revoked and dissolved.

THE LITTLE JOSEPHINE MINING COMPANY v. WILLIAM FULLERTON ET AL.

(58 Federal 521. Circuit Court of Appeals, Eighth Circuit. Oct. 16, 1893.)

[1]**Three veins dipping so as to unite or cross.** Plaintiff owned two mining claims, the veins of which united below the surface, and, at a much greater depth, met the vein of defendants' claim, which had been located long after the location of the older of plaintiff's claims. In ejectment for the vein below the point of meeting, which plaintiff claimed under Rev. St. § 2336, as having the prior location, the only issue was whether the veins united or crossed each other. *Held*, that it was immaterial whether the location of plaintiff's junior claim was prior or subsequent to defendants' location, and rulings upon evidence on that question, if erroneous, were not prejudicial to plaintiff.

Verdict failing to cover ore at point of crossing. A judgment on a general verdict for defendants in such action will not be reversed because it fails to define plaintiff's rights, under Rev. St. § 2336, to the ore within the space of intersection of the veins, where the question was not called to the attention of the court either before the verdict or when it was received, and where a statute of the state provides that a verdict for part of the premises claimed shall particularly specify such part.

The denial of a motion for a new trial is not subject to review in the federal appellate courts.

In error to the Circuit Court of the United States for the District of Colorado.

At Law. Action of ejectment by the Little Josephine Mining Company against William Fullerton, Edward F. Clinton, Job V. Kimber, Richard Mackey, Richard W. Moseley, and John B. Ballard, to recover possession of a vein of ore. Verdict and judgment for defendants. Plaintiff brings error. Affirmed.

JOHN G. TAYLOR, (R. T. MCNEAL, on the brief,) for plaintiff in error.

[1]*Cons. Wyoming Co.* v. *Champion Co.* 18 M. R.—

WILLARD TELLER, (HARPER M. ORAHOOD and EDWARD B. MORGAN, on the brief,) for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge. The Little Josephine Mining Company, a corporation, brings this writ of error to reverse a judgment in favor of the defendants in error in an action of ejectment which it brought in 1889 to recover possession of a vein of ore it claimed to own, and which the defendants had taken possession of, about 800 feet below the surface of the earth. The defendants claimed that they were the owners of this vein at that point, and entitled to its possession, by virtue of their ownership of a vein which there intersected the plaintiff's vein. The case was tried to a jury. The facts were that the plaintiff was the owner of the Slaughterhouse lode mining claim, which was patented in 1871 upon a location made in 1866 on the Slaughterhouse vein, which had a dip northwardly, and which, after passing out of its northerly side line extended down vertically, struck the Fagan vein about 800 feet below the surface. The Fagan vein was owned by the defendants. Its apex was within the boundaries of the Fagan lode mining claim, which was located on the surface some distance northerly of, and nearly parallel to, the Slaughterhouse claim. The Fagan claim was originally located May 3, 1876, but prior to its location a large portion of the tract included within its boundaries had been located, and was then legally held, as a part of the Wheeler lode mining claim. Prior to December, 1887, the defendants became owners of both these claims. On December 1, 1887, they filed amended location certificates of both the Wheeler and Fagan claims, the effect of which was to change their boundary lines somewhat, and to swing them clear of each other. The original discovery shaft of the Fagan claim was within the

boundary lines of the original Wheeler claim, and the defendants sank a new discovery shaft on it December 1, 1887. Upon these amended certificates of location these two claims were patented before this action was brought. The Little Josephine mining claim, which is owned by the plaintiff, is situated between, and nearly parallel to, the Slaughterhouse and Fagan claims, and was located December 19, 1877. The Little Josephine vein, the apex of which is within the surface lines of this claim, dips northwardly, and at the depth of 467 feet below the surface it unites with the Slaughterhouse vein, and the vein thus formed by their union continues down with a dip northwardly, until it strikes the Fagan vein. The dip of the Fagan vein is southwardly, and it passes out of the southerly side line of the Fagan claim extended vertically downward before it meets the Slaughterhouse vein.

The plaintiff claims that at the point of meeting these two veins unite, and form a single vein, while the defendants maintain that they intersect each other like the parts of the letter "X". In their brief the counsel for the plaintiff say: "The main contention was whether at this point these two veins united and became one, or crossed each other on their dip, and continued on as distinct veins." On another page they say: "Practically speaking, this was all the contention there was at the trial." If a critical examination of the record does not fully justify this statement, it certainly strongly supports it, and in the consideration of the case we give the plaintiff the benefit of the doubt, and treat this statement of its counsel as true. The court below properly charged the jury that the Slaughterhouse location was older than the Fagan location; that if the two veins united, the plaintiff would be entitled to all the ore in the vein below the point of union; read to them section 2336, Rev. St., viz: "Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or

mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purpose of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union;"—and told them that what was required of them was to say, upon all of the testimony submitted, whether these two veins crossed each other or united at their point of meeting. It is conceded that this portion of the charge is correct, but it is assigned for error that the court below admitted in evidence the original certificate of the Fagan claim, rejected evidence tending to show that the original discovery shaft of that location was within the boundary lines of the prior Wheeler location, and charged the jury that the Josephine location was younger than the Fagan. Whether or not there was an error in these rulings it is unnecessary to pause to consider, because it is perfectly evident that if they had all been reversed this could not have benefitted the plaintiff. The only effect of opposite rulings would have been to have dated the Fagan location December 1, 1887, when the amended certificate was filed, instead of May 3, 1876, when the original certificate was filed, and thus to have made the Josephine location of December 19, 1877, senior to the Fagan location. But this could not in any way have effected the issue on trial. Both these locations were years junior to the Slaughterhouse location, which passed to patent in 1871. Moreover the Josephine vein united with the Slaughterhouse vein only 467 feet below the surface, and more than 300 feet before the united vein struck the Fagan vein. From the point of union of the Slaughterhouse and Josephine veins to the point of contact of this united vein with the Fagan vein, 800 feet below the surface, the Slaughterhouse, being the prior location, took the entire vein. The title to it related back to the Slaughterhouse location as early as 1871, and the court properly instructed the jury that, if this vein united with the Fagan, the

plaintiff must prevail, under the statutes, because the Slaughterhouse location was the older on that ground. Under this state of facts it was entirely immaterial whether the location of the Josephine on its branch of the Slaughterhouse vein was prior or subsequent to the location of the Fagan vein, and error without prejudice is no ground for reversal. *Sanger* v. *Flow*, 4 U. S. App. 32; 1 C. C. A. 56, 62; 48 Fed. 152; *Dorsheimer* v. *Glenn*, 4 U. S. App. 500; 2 C. C. A. 309; 51 Fed. 404; *Railroad Co.* v. *Stoner*, 4 U. S. App. 109; 2 C. C. A. 437, 444; 51 Fed. 649.

It was claimed at the argument that the Josephine claim extended 375 feet farther east than the Slaughterhouse claim, and that as to this portion of the vein in dispute the title must depend upon the priority of the Josephine location, over the Fagan location, but this claim finds no support whatever in the record before us, and can receive no consideration. The record discloses that the witnesses for the plaintiff testified that the Josephine vein united with the Slaughterhouse vein, but it is entirely silent as to the extent or exact location of either claim on the surface of the ground. Neither the certificates of location, nor the patents, nor any other evidence of the extent or limits of any of these locations has been preserved in the bill of exceptions.

The denial of the motion for a new trial, which is also assigned as error, was a matter in the discretion of the court below, and is not subject to review in this court. *Railroad Co.* v. *Howard*, 4 U. S. App. 202; 1 C. C. A. 229; 49 Fed. 206; *McClellan* v. *Pyeatt*, 4 U. S. App. 319; 1 C. C. A. 613; 50 Fed. 686; *Village of Alexandria* v. *Stabler*, 4 U. S. App. 324; 1 C. C. A. 616; 50 Fed. 689.

The last assignment of error is that "the court erred in entering its judgment for the defendants without ascertaining and defining the rights of this plaintiff in and to the ore at the point of intersection and crossing of the Slaughterhouse and Fagan veins, and for a failure by said judgment

and decree to completely fix and determine all the rights of the respective parties to the property in controversy."

But this was not a suit in equity. It was an action of ejectment, the trial of which resulted in a general verdict for the defendants. The court entered the customary judgment of dismissal on such a verdict. The argument used to assail this action of the court is that, as the jury must have found that the two veins crossed each other, the court should have entered a decree in favor of the plaintiff for the recovery of the ore in the space of intersection. This position is untenable. No request was made in behalf of the plaintiff for the court to instruct the jury to return a verdict in its favor for the ore in this space, if there was any, nor was the attention of the court called to this question in any way before the verdict, or when it was received. The Code of Colorado expressly provides that in an action of ejectment, "if the verdict be for all the premises claimed, as specified in the complaint, it shall in that respect be for such premises generally. If the verdict be for part of the premises described in such complaint, the verdict shall particularly specify such part, as the same shall have been proved, with the same certainty hereinbefore required in the description of the premises claimed." Code Colo. § 269.

If the counsel for the plaintiff desired a verdict of the jury for the ore in the space of intersection, in case the jury found the veins did not unite, it was their privilege to pray the court for an instruction to that effect, or, when the verdict came in, to move that the jury be instructed to modify their verdict to that effect; and if that request was refused, and a proper exception taken, this court might have considered whether there was error in such a ruling of the court below. This privilege the counsel for the plaintiff waived. They chose to stake the whole case, and win or lose all, on the decision of the single question whether the veins united or crossed. This they had the right to do, and, as the court below was

not requested at the trial to consider or determine the question now presented in this court, and did not act or refuse to act upon it, it surely committed no error here for this court to consider.

That the judgment of dismissal was properly entered upon this general verdict for the defendants is axiomatic. A general verdict for the defendants in ejectment, which results from the trial of a hotly-contested issue of fact, certainly does not authorize the court to enter a judgment in that action in favor of the plaintiff for the possession of any of the property in controversy. We are of the opinion that there was no material error in this case, and *the judgment below is affirmed.*

H. C. MILLS ET AL. V. GEORGE FLETCHER ET AL.

(100 California 142; 34 Pac. 637. Supreme Court. Oct. 18, 1893.)

Patent to excluded area. The offer in evidence of a patent (to show outstanding title) upon parcel of the mining premises not within the area of conflict, was a tender of irrelevant testimony.

[1]**Entitled to the whole year.** Mining claimants are entitled to the whole of each calendar year to do the annual work and adverse claimants cannot lawfully enter and locate before the expiration of the year where the work had been done for the previous year.

[2]**Not required after ouster.** After an adverse entry by strangers who maintain possession of the only available opening on the mine such strangers cannot complain that the annual labor was not done by the parties ousted by them.

No cross complaint needed in ejectment. In ejectment defendant has no occasion to file a cross complaint to quiet title, nor should his title be pleaded except as a defense.

Misnomer of pleadings. What is in effect an answer is to be treated as such, though misstyled a cross-complaint by defendant.

Amount in verdict binding on court. The court in a law action cannot disregard the amount of damages found by the verdict and substitute their own finding.

Appeal from a judgment of the Superior Court of Nevada County. The facts are stated in the opinion.

P. F. SIMMONDS, and KITTS & BOWMAN, for Appellants.

J. M. WALLING, for Respondents.

VANCLIEF, C. Action of ejectment to recover the possession of two adjoining quartz lode mining claims, situate on the public mineral land of the United States, known as the "Hathaway Claim" and the "Peck Claim," each being particularly described in the complaint by metes and bounds; and also to recover three thousand dollars damages for the

[1]*Belk* v. *Meagher*, 1 M. R. 522. *Atkins* v. *Hendree*, 2 M. R. 328.

[2]*Trevaskis* v. *Peard*, 111 Cal. 599; 18 M. R.—. *Utah Co.* v. *Dickert Co.* 6 Utah 183; 21 Pac. 1002.

severance and removal from said claims of gold-bearing rock. The complaint was not verified.

By their answer the defendants deny generally each and every allegation in said complaint contained.

"Aver that the premises described in plaintiffs' complaint are public mineral lands of the United States, and that plaintiffs have not done any work, or performed any labor, or made any improvements thereon since December 31, 1889."

And also aver that the cost of mining and milling the gold-bearing rock mentioned in the complaint largely exceeded the value of said rock and the gold and other minerals extracted therefrom.

Then "by way of cross-complaint" the defendants aver that they own and possess certain premises known as the "Consolidated Quartz Mining Claim," containing forty thirty-sevenths acres, and describe it by metes and bounds. Then further aver that plaintiffs claim an interest therein adversely to defendants without right, and also that their said "Consolidated Quartz Mining Claim" includes within its boundaries a portion of the premises described in plaintiffs' complaint, but that the boundaries and extent of said portion so included cannot be determined by defendants from said complaint, or by any other means.

The prayer of the so-called cross-complaint is that defendants may be adjudged to be the owners of the premises described in their cross-complaint, and that their title thereto may be quieted against the plaintiffs.

The cross-complaint not being verified the plaintiffs answered it by a general denial and by a repetition of all the affirmative averments of their complaint; and also disclaimed any interest in the premises described in said cross-complaint, except such portions thereof as were within the exterior boundary lines of the claims described in their complaint.

The cause was tried by a jury on special issues besides the general issue. The jury found for the plaintiffs on all the

special issues and also returned a general verdict for plaintiffs.

The special issue as to damages was submitted to the jury in the following language: "Question No. 16. How many dollars damages are plaintiffs entitled to recover, if entitled to recover damages at all?" The answer to this was: "One dollar."

In addition to the special and general verdict of the jury the court made special findings, all in harmony with the verdict of the jury, unless the following is inconsistent therewith:

The court found that defendants took from plaintiffs' claim one hundred and sixty-two and one-half tons of gold-bearing quartz rock. "After said rock had been severed from the realty said defendants converted the same to their own use, and received as proceeds from the working thereof the sum of one thousand nine hundred and twenty-two dollars and seventy-one cents. That they expended in and about said rock, after the same had been taken from the ledge in plaintiffs' claim, as necessary expenses in reducing said rock and extracting the gold therefrom, the sum of eight hundred and seven dollars and twenty-five cents. That in extracting and reducing said rock defendants expended the sum of two thousand seven hundred and fifty dollars."

As conclusions of law the court found that plaintiffs were entitled to recover the ground in dispute, and also to recover from the defendants, Skewes and Fletcher, damages in the sum of one thousand and fifteen dollars and forty-six cents, and rendered judgment accordingly.

The defendants bring this appeal from the judgment on the judgment-roll containing their bill of exceptions.

1. About one-third part of plaintiffs' claim is within section 35 of the government survey, and two-thirds thereof are in section 34.

For the purpose of showing an outstanding title the defendants offered in evidence a patent from the government to the Central Pacific Railroad Company for section 35, which was

excluded by the court, and this action of the court is assigned as error by appellants.

In the first place it appears that defendants put in evidence "a map of the premises; which map, it was admitted, correctly delineated the Peck, Hathaway, Standard and Consolidated locations, and the conflict between them." This map shows that no part of the land in dispute is within section 35. In the second place it is averred in the answer of the defendants that "the premises described in plaintiffs' complaint are public mineral lands of the United States"; and the answer of plaintiffs to the so-called cross-complaint is to the same effect. It follows, at least, that the offered patent was irrelevant to any material issue, and that defendants could not have been injured by its exclusion.

2. It is contended that the court erred in giving each of the following instructions to the jury:

"If you find from the evidence that defendants or their grantors unlawfully entered upon the claims of plaintiffs in the year 1890, and took possession of plaintiffs' tunnel, posted a notice of location upon said claim, recorded said notice of location and extracted rock and earth therefrom, against the consent of plaintiffs' and under a claim hostile to plaintiffs' title; that thereafter defendants and their grantors kept exclusive possession of said claims until the commencement of this action; then plaintiffs are entitled to recover possession of the premises in controversy, regardless of whether defendants or their grantors made a new location of said premises in 1891.

"Defendants could not go wrongfully, if you find that they did so, upon plaintiffs' claim in 1890, take possession thereof, and while thus wrongfully holding such possession make a new location of said claims under the claim that the plaintiffs had not made the annual expenditure for 1890.

"Plaintiffs were entitled to the whole of the year 1890 in which to make the annual expenditure for that year, provided plaintiffs had made the annual expenditure for 1889, or had resumed work upon said claims in 1890, and prior to the entry of the defendants or their grantors."

"The jury is instructed that on each mining claim located after the tenth day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, unless such labor is excused by reason of some act of the defendants excusing the performance of such work sufficient for that purpose."

As applied to the evidence, I think these instructions substantially correct. It is admitted that plaintiffs did the required annual labor on their claims prior to January 1, 1890. If the facts hypothetically stated in these instructions are true, the defendants should not be heard to object that plaintiffs did not do the annual labor required by law during the year 1890, or any subsequent year while they remained in adverse possession, and occupied the only tunnel that was open to the lode, and through which plaintiffs intended to work. Conceding that plaintiffs might have been permitted by defendants to do work on the surface of their claims, there is no evidence that such work, or any work outside of the tunnel occupied by defendants, would have tended to improve or develop their claims, or could have been done to any advantage whatever; and if not, such work would not have answered the purpose of the law requiring annual labor. But there is no evidence that defendants would have permitted even useless work on the surface.

It is contended for appellants that the verdict of the jury as to the amount of the damages is conclusive, and not merely advisory, except as against the power of the court to grant a new trial, and I think this point should be sustained.

The facts stated in the so-called cross-complaint constitute a mere answer, and not a cross-complaint. So far as material they are: That defendants are the owners of, in the possession of, and entitled to the possession of, the demanded premises. The averment that plaintiffs claim an interest in the premises adversely to defendants is unnecessary, since that fact is even more explicitly averred in plaintiffs' complaint, and is put in issue by the general denial in the answer, and the averment that plaintiffs' claim is without right is also included in the general denial of all the allegations of the complaint. It is immaterial what the defendants called their pleading. Its character is to be determined by the court. *Holmes* v. *Richet*, 56 Cal. 307; 38 Am. Rep. 54. *Meeker* v. *Dalton*, 75 Cal. 156.

The action is an action at law, and the defense is only a legal defense. A verdict and judgment upon the issues raised and tendered by the answer would quiet the title of the prevailing party as effectually as would any form of judgment asked for in the prayer appended to the so-called cross-complaint. It has several times been decided that in actions of ejectment and actions to quiet title, in which the defendant relies upon title in himself, a cross-complaint is unnecessary. *Wilson* v. *Madison*, 55 Cal. 5; *Doyle* v. *Franklin*, 40 Cal. 107; *Miller* v. *Luco*, 80 Cal. 261; *Meeker* v. *Dalton*, 75 Cal. 156. Matter constituting a complete defense should not be pleaded as a cross-complaint. *Hills* v. *Sherwood*, 48 Cal. 386; *Jones* v. *Jones*, 38 Cal. 585; *Germania Assn.* v. *Wagner*, 61 Cal. 349. The defendants in this action being in possession needed no affirmative relief. A general verdict and judgment thereon in their favor would have been conclusive evidence of their title as against the plaintiffs, and of their right to the possession which they already had.

If the foregoing views, as to the legal nature of the action and defense are correct, it follows that the court erred in giving judgment for damages in a sum exceeding one dollar. The court should not have disregarded the verdict of the jury, except by ordering a new trial upon the conditions and in the mode prescribed by the Code of Civil Procedure.

I think the judgment should be affirmed, except in respect to the damages, in which respect it should be modified by reducing the amount of damages to one dollar.

TEMPLE, C., and SEARLS, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed, except in respect to the damages, in which respect it is modified by reducing the amount of the damages to one dollar, each of the parties to pay their own costs of appeal.

MCFARLAND, J., DEHAVEN, J., FITZGERALD, J.

INDIANAPOLIS NAT. GAS CO. v. JOHN F. KIBBEY, Trustee.

(135 Indiana 357; 35 N. E. 392. Supreme Court. Nov. 24, 1893.)

Signed by one party only. The signing and acknowledgment by the party of the first part of a contract granting the exclusive right to bore and maintain gas wells on a tract of land, and its acceptance and recording by the party of the second part, make it a binding contract between the parties, though it is not signed by the party of the second part.

[1]**Strangers cannot question terms of contract.** Whether a contract for the exclusive right to bore and maintain gas wells on a tract of land is a license or a lease, or executory or executed, or whether it is a fair one between the parties, cannot be brought into question by a trespasser, and stranger to the contract in an action by the grantee to enjoin him from boring wells.

[2]**Injunction is the proper remedy** against one who attempts or threatens to bore gas wells on land, to the flowage of gas under which plaintiff has by contract with the owner acquired the exclusive right, as the damages could not be measured.

[3]**Ejectment does not lie.** One who has acquired a tract of land for the purpose and with the exclusive right to bore and maintain gas wells thereon under a contract by which the owner covenants not to allow wells to be bored on an adjoining tract, could not maintain ejectment against one entering on the adjoining tract, and threatening to bore wells, since, as to that tract, he only has the right to the gas under the surface.

Appeal from Circuit Court, Madison County; A. ELLISON, Judge.

Action by John F. Kibbey, trustee, against the Indianapolis Natural Gas Company for an injunction. From a judgment for plaintiff, defendant appeals. Affirmed.

KANE & DAVIS, for appellant.

JOHN F. KIBBEY, for appellee.

[1]*Bartley* v. *Phillips*, 165 Pa. 325; 18 M. R.—
[2]*Bettman* v. *Harness*, 42 W. Va. 433; 18 M. R.—
[3]*Duffield* v. *Hue*, 17 M. R. 253.

HOWARD, J. This was a suit brought by the appellee for injunction. A demurrer to the complaint was overruled, and, the appellant declining to plead further, judgment was rendered in favor of the appellee, enjoining the appellant from drilling a gas well in the premises described in the complaint.

The appellee, as assignee, claimed title to the gas lands in question under the following contract:

"This agreement, made and entered into this 26th day of September, 1889, by and between Mary E. Neese and W. S. Neese, of the first part, and O. F. Deal, of the second part, witnesseth that the parties of the first part have this day granted and contracted to the second party, his heirs or assigns, one tract of land twenty feet square of the following real estate [describing it], containing eighty acres, more or less * * * for the purpose and exclusive right of a gas well on said twenty-foot square tract.

"Said second party, his heirs or assigns, shall have the right of ingress and egress to and from the twenty-foot square tract of land over said entire tract for the purpose of drilling, utilizing, and operating said gas well, and piping and conducting gas therefrom, including the erecting of suitable sheds over said well, and the right to erect and remove any and all machinery and fixtures necessary to the drilling, repairing, and operating said well, and the right to put down water wells, and use sufficient water for said purposes. Said second party, his heirs and assigns, shall also have the right to the use of the highways adjoining any part of said entire premises for the laying of mains for the transportation of gas and oil.

"All pipes that are placed on said premises in reaching said highways shall be of sufficient depth not to interfere with the cultivation of the soil, when it can be so done. Said second party agrees to pay to said first party all damages that may accrue to them in the way of injury to buildings, fences, or crops occasioned by work under this contract.

"In consideration of said contract and other conditions, said

second party agrees to deliver to said first party, his heirs, or assigns, natural gas, free of charge, necessary for domestic use, for dwelling houses and farm use on said premises on or before the first day of February, 1890, in a gas main along the public highway in front of said buildings.

"And, as an additional consideration, the second party agrees to pay to said first party an annual rental of fifty dollars each year for each gas well drilled as aforesaid which produces gas in paying quantities sufficient for manufacturing purposes. Said payments shall commence after the completion of each gas well, and continue annually during the continuance of this contract, and shall be placed at the C. Quick & Co. Bank, of Frankton, Indiana.

"This contract shall be deemed to commence at and run from the date of the signing thereof, and shall be deemed to have terminated whenever natural gas ceases to be used generally for manufacturing purposes, or whenever the second party, his heirs or assigns, shall fail to pay or tender the rental price herein agreed upon within sixty days of the date of its becoming due. And in the event of the termination thereof for any cause, all rights and liabilities thereunder shall cease and terminate.

"Now, as a part of said contract, and in further consideration thereof, the parties of the first part covenant and agree, and hereby bind themselves, their heirs, executors, and assigns, not to drill or suffer or permit others to drill or put down any other gas well or wells on any part of said entire eighty-acre tract of land described above, during the continuance of said contract, except as provided below.

"It is further agreed that all gas secured from the wells mentioned above shall be used in Frankton, Madison County, or in the vicinity; and in case the second party, his heirs or assigns, shall pipe or cause to be piped of the gas secured as above from Frankton and vicinity, then this agreement shall cease and terminate.

"It is further agreed that whenever the first party desires to bore a gas well on said premises, not included in said twenty-foot tract, for residence purposes for himself or his neighbors, he can do so.

"This contract shall extend to and be binding upon the heirs, executors, and assigns of the parties hereto."

The contract was signed and acknowledged by Mary E. Neese and William S. Neese, the parties of the first part, and was duly recorded in the recorder's office of Madison County; but it was not signed by Otis F. Deal, the party of the second part.

Otis F. Deal dying, the contract was, by order of court assigned to the appellee, as trustee for parties named in the complaint.

Appellant's first contention is that this contract has never been in force, for the reason that it was not signed by the party of the second part. This question has been expressly decided against the position assumed by counsel. The signing and acknowledgment of the instrument by the party of the first part, and the acceptance and recording thereof by the party of the second part, make it a contract between the parties. *Railway Co.* v. *Fisher*, 125 Ind. 19; 24 N. E. 756; *Harlan* v. *Gas Co.* 133 Ind. 323; 32 N. E. 930.

Counsel next enter upon an extended examination of the contract, as to whether it is executed or executory, as to whether it is a lease or a license, as to whether the promises made therein by the party of the second part are a sufficient consideration on their part, and as to whether the contract is a fair one between the parties, and one which ought to be upheld. These might be proper questions for consideration in a suit between the parties to the contract and upon the contract itself, to enforce its provisions, to declare a forfeiture, or for damages under it. But, so far as appears from the complaint, the appellant is a stranger to the contract, and appears merely

as a trespasser upon whatever rights the appellee may have to the land in question.

The complaint and contract show that the appellee has the exclusive right to put down gas wells on 20 feet square of ground in the northeast corner of an 80-acre tract, and also that, seemingly to protect the flowage to such wells, and give a "field" or territory from which gas or oil may be drawn, the parties of the first part further agree and "bind themselves, their heirs, executors, and assigns, not to drill or suffer others to drill or put down any other gas well or wells on any part of said entire eighty-acre tract of land" except that the parties of the first part may sink a well for their own private use, or the use of their neighbors, for domestic purposes.

Whatever name may be given to the rights of the appellee in the 80-acre tract outside of the 20-foot square, it is clear that those rights include the title to the flowage of whatever gas may underlie the whole tract, save only the right to the owner to sink a well for domestic uses.

Appellant can therefore have no claim or right from any source to sink a well upon any part of said land. Moreover, even if the owner of the fee could give appellant any right, by way of assignment or otherwise, as against the right of appellee, expressly given under the contract, the complaint shows no such right given.

The complaint shows the appellant to be simply a stranger who has entered upon said land, and "engaged in the erection of a derrick thereon, and threatens and intends, without the consent of the plaintiff, and unlawfully, to bore a well on said land for gas, and threatens to convey from said premises the gas flowing from such well by pipes." And further, "that if said defendant is permitted to do this, it will greatly lessen the flow of natural gas from any well that said plaintiff may cause to be bored on said land, whereby irreparable damage will be caused," etc.

We think that an injunction was the proper remedy. An

action for damages would have been inadequate, since the damages could not be measured.

By the terms of the contract, appellee had a right to all the gas under the 80-acre tract that could be obtained by boring within the 20-foot square, save that which might be obtained from one well for the domestic use of the owner and his neighbors.

From the nature of the product it is evident that one flowing well would withdraw the gas from a considerable territory, and that other wells could not be sunk within such territory without diminishing the flow to the first well. How much the flow of appellee's well would be diminished, however, could not be determined; the damages would not be measured in money. Neither would ejectment lie as to that part of the 80-acre tract outside the bounds of the 20-foot square, for as to that part of the land appellee has only the right to the gas under the surface which may be drawn to the wells sunk within the square. *Funk* v. *Haldemann*, 53 Pa. St. 229; *Allison's Appeal*, 77 Pa. St. 221; 1 High, Inj. § 697.

Whatever might be the rights of the grantors in the contract set out in the complaint, it is clear that appellant had no right to do the acts complained of, and that the appellee was entitled to the injunction granted.

The judgment is affirmed.

ROBERT TURNER ET AL. v. ALFRED A. K. SAWYER.

(150 U. S. 578; 14 Sup. Ct. Rep. 192. Supreme Court. Dec. 11, 1893.)

Present co-owner. The right to acquire by forfeiture, under Rev. St. § 2324, the part interest of one who fails to pay his proportion of the expenditure for annual labor, exists only in favor of one who is a co-owner in the year for which such labor is performed.

The holder of a sheriff's certificate of sale is not a co-owner. The title is in the judgment debtor until the sheriff's deed issues.

[1]**Patent procured by co-owner.** The owner of a part interest in a mining claim is a co-tenant with the other owners; and if, without their knowledge he procures a patent in his own name, he becomes a trustee for them, and equity will enforce the trust in their favor.

[2]**No area in conflict.** The Act requiring an adverse claim to be filed "showing the nature, boundaries and extent of such adverse claim" does not apply where there are not two hostile conflicting locations.

Party in privity may sue without adverse. The regulations of the commissioner of the general land office, whereby an adverse claimant is allowed to prove his better right to enter public lands, do not oust the jurisdiction of the courts to protect his rights by independent suit.

Appeal from the Circuit Court of the United States for the District of Colorado. Affirmed.

This was a bill in equity filed by the appellee, Sawyer, against Robert Turner, George E. McClelland, and J. S. Allison, the purpose of which was to have the defendant Turner declared a trustee for the use of the plaintiff of an undivided five-eighths interest in what was known as the "Wallace Lode," which had peen previously patented by the

[1] *Brundy* v. *Mayfield*, 15 Mont. 201; 38 Pac. 1067.

A co-tenant need not adverse but may rely on the rule that the title assured by the patent enures to the benefit of all the co-owners. *Malaby* v. *Rice*, 15 Colo. App. 364; 62 Pac. 228.

Co-tenant buying an adjoining claim to secure the Apex buys for the protection of the common title. *Cedar Co.* v. *Yarwood*, 27 Wash. 271; 67 Pac. 749.

The same as to purchase of a conflicting overlap. *Franklin Co.* v. *O'Brien*, 22 Colo. 129; 18 M. R. —

government to Turner, and to compel a conveyance of the same to the plaintiff.

The case was submitted upon an agreed statement of facts, which was substantially as follows: The Wallace lode, so called, was discovered and located by John Clark on September 20, 1878. On August 12, 1882, Clark conveyed an undivided three-fourths of this lode to Amos Sawyer and Marcus Finch. On May 1, 1882, Clark conveyed the other one-fourth interest to William Hunter, but the deed was never recorded, the parties supposing it to be lost; and on October 25th he made another deed to Hunter, which contained a recital that it was made to supply the place of the other. On October 26, 1882, Amos Sawyer and Marcus Finch reconveyed the undivided one-half of the lode to John Clark. On January 8, 1883, Marcus Finch conveyed an undivided one-eighth to Alice E. Finch. On March 16, 1883, Clark and Hunter conveyed three-fourths of the Wallace lode to Amos Sawyer and John S. Sanderson.

At this time, then, the lode was owned as follows: Amos Sawyer, one-half, or four-eighths; John S. Sanderson, three-eighths; Alice E. Finch, one-eighth.

A co-tenant is bound to pay his portion of the annual labor unless he abandons or offers to do his own share. *Holbrooke* v. *Harrington*, (Cal.) 36 Pac. 365.

A purchase of an outstanding title by one co-tenant is for the benefit of all and he may be declared trustee of the new title. *Mills* v. *Hart*, 24 Colo. 505; 52 Pac. 680.

At the instance of one co-owner another co-owner located an adjoining fraction in his own name. Held that the statute of frauds applied and prevented the proof that the location was for the common benefit. *Reagan* v. *McKibben*, 11 So. Dak. 270; 19 M. R.—

After failure of all to do their annual labor a co-tenant cannot re-locate in his own name. If he does he becomes trustee for all. *McCarthy* v. *Speed*, 11 So. Dak. 362; 19 M. R. —

Each of three persons located a claim in his own name under oral agreement that the three claims should be owned in common. Held valid and that the statute of frauds did not apply. *Eberle* v. *Carmichael*, 8 N. Mex. 169, 696; 42 Pac. 95; 47 Pac. 717.

[2]*Champion Co.* v. *Cons. Wyoming Co.* 16 M. R. 145.

It so remained from March 16, 1883, to January 12, 1885, when Amos Sawyer assumed to convey his undivided one-half interest to Alfred A. K. Sawyer, who also became possessed of the one-eighth interest of Alice E. Finch, November 3, 1886.

The controversy arose over a lien filed August 14, 1883, by one John F. Teal for annual labor done upon the lode at the request of John S. Sanderson and Amos Sawyer. Teal claimed a lien for the sum of $148.10, and filed notice thereof in the recorder's office of Clear Creek County. One Charles Christianson also filed a similar notice, claiming a lien for $227.95. On January 12, 1884, Teal instituted a suit in the county court of Clear Creek County to enforce his lien, and made John S. Sanderson, Marcus Finch, P. F. Smith, and ——— Sawyer defendants, as the owners thereof. There was no service upon Sawyer, and he was not in court. On June 2, 1884, Teal proceeded to sell the interest of John S. Sanderson, Marcus Finch, and P. F. Smith to pay the amount of his decree, at which sale A. K. White became the purchaser, took his certificate of purchase from the sheriff, and sold and assigned it to Turner, who obtained a sheriff's deed on March 3, 1885. This deed purported to convey the whole Wallace lode. Christianson instituted a suit against the same defendants as in the Teal suit, which was pending at the time, to enforce his lien against the same.

On April 24, 1885, Turner, who had done the annual labor on the claim for the year 1884, before he obtained a sheriff's deed, published a forfeiture notice against the appellee, Sawyer, under Rev. St. § 2324, but no forfeiture notice was published against Alice E. Finch, who still owned an undivided one-eighth of the lode, nor against Amos Sawyer, who owned one-half of the lode during the year 1884, and until January 12, 1885, as above stated. Appellant Turner declined an offer made January 18, 1885, to pay five-eighths of the $100 for the annual labor of 1884 on behalf of Alice E. Finch and Amos Sawyer, on the ground that the records showed only

Sanderson and Sawyer as having any remaining interest. On October 27, 1885, Turner filed in the office of the clerk and recorder of Clear Creek county an affidavit that Alfred A. K. Sawyer, the appellee, had wholly failed to comply with the demands contained in the forfeiture notice. Subsequently, and about November 1st, Turner instituted proceedings in the United States land office at Central City, Colo., for the purpose of procuring a patent for the lode in his own name, and on April 13, 1886, a receiver's receipt was issued to him by the receiver of the land office, acknowledging payment in full for the entire lode; and on April 20th he conveyed an undivided one-fourth interest to George E. McClelland, by deed recorded December 6, 1886, and another undivided one-quarter to J. S. Allison, by deed recorded May 19, 1886.

On March 17, 1887, the appellee, Sawyer, filed this bill charging the patent to have been procured by the appellant, Turner, by false and fraudulent representations as to ownership, and praying that the title to an undivided five-eighths of the lode be deemed to belong to the appellee, and that Turner convey the same to him.

Upon the hearing in the court below it was found that at the time Turner applied for the patent and received the receipt therefor, he was not the legal owner of an undivided five-eighths of such lode, and it was decreed that he convey the same to the appellee, Sawyer, and the other defendants were enjoined from interfering.

From this decree an appeal was taken to this court by Turner and McClelland.

L. C. ROCKWELL, for appellants.

EDWARD LANE and F. D. MCKENNEY, for appellee.

Mr. JUSTICE BROWN, after stating the case, delivered the opinion of the court.

The real question in this case is whether the title to the half interest which Amos Sawyer assumed to convey to the appellee, Alfred A. K. Sawyer, January 12, 1885, was obtained by Turner through the proceedings taken by Teal in the enforcement of his lien for labor done upon this lode, or by the forfeiture notice published for the annual labor done in 1884.

1. It is evident that nothing can be claimed by virtue of the suit begun by Teal, January 12, 1884, against John S. Sanderson, Marcus Finch, P. F. Smith, and —— Sawyer, as the owners of such lode, to enforce his lien, since there was no service upon Sawyer, no appearance entered for him, and he was never in court. Judgment was rendered in this suit against Sanderson, Smith, and Finch, the last two of whom appear to have had no interest in the property. Whether such proceedings were effective as against Sanderson, it is unnecessary to inquire. Not only was Sawyer not served in the suit, but in the execution sale no pretense was made of the sale of any interests except those of Sanderson, Smith, and Finch, which were struck off to A. K. White, and were subsequently sold by him to Turner, to whom the sheriff's deed was given March 3, 1885.

2. It remains, then, to consider whether Turner acquired such interest by the publication of his forfeiture notice against Sawyer for the annual labor of 1884. This notice was as follows:

"To A. A. K. Sawyer, residence unknown: You are hereby notified that I have performed the annual labor required by law for the year 1884 upon the Wallace lode, situated in Cascade mining district, Clear Creek county, Colorado, and that unless within the time prescribed by law you pay your proportionate amount of said expenditure your interest in said lode will be forfeited to me under the provisions of section 2324 of the Revised Statutes of the United States. Robert Turner."

This notice was published pursuant to Rev. St. § 2324,

which enacts that "upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners, who have made the required expenditures."

It will be observed that the right to give this notice of a claim for contribution is limited to a co-owner who has performed the labor. Turner was not a co-owner with Sawyer at any time during 1884, as Alfred A. K. Sawyer did not receive his deed from Amos Sawyer until January 12, 1885, and Turner did not receive his deed from the sheriff until March 3, 1885. He did, however, hold an inchoate title by virtue of White's purchase at the execution sale of June 2, 1884, and the subsequent assignment, August 25, 1884, of the sheriff's certificate to him. He appears also to have obtained the assignment of certain other judgments which had been recovered by William Hunter against Sanderson and Smith. These judgments were assigned to him August 27, 1884, sales made under them January 12, 1885, and certificates of sale issued to Turner, who thus became the purchaser under these judgments. Neither of these, however, made him a co-owner during the year 1884, within the meaning of the statute, which, providing as it does for the forfeiture of the rights of a co-owner should be strictly construed. Indeed, by the laws of Colorado title to land sold under execution remains in the judgment debtor until the deed is executed. *Hayes* v. *Mining Co.* 2 Colo. 273, 277; *Laffey* v. *Chapman*, 9 Colo. 304; 12 Pac. 152; *Manning* v. *Strehlow*, 11 Colo. 451, 457; 18 Pac. 625.

This accords with cases from other states, which hold that the estate of the defendant in execution is not divested by a seizure and sale of his lands, but only by a payment of the purchase money and delivery of a deed. The sheriff's certificate is necessary as written evidence to satisfy the statute of frauds and to identify the holder as the person ultimately entitled to the deed, but it does not pass the title to the land, nor constitute the purchaser the owner thereof. *Catlin* v. *Jackson*, 8 Johns. 520; *Gorham* v. *Wing*, 10 Mich. 486, 493; *Green* v. *Burke*, 23 Wend. 490, 498; *Hawley* v. *Cramer*, 4 Cow, 717, 725.

It seems, however, that Turner, soon after the making and filing by him of an affidavit of nonpayment by Sawyer of his alleged proportion of his claim for labor, instituted proceedings in the land office at Central City for the purpose of procuring a patent for this lode, to be issued to himself alone, and prosecuted such proceedings so far as to obtain, on April 13, 1886, a "receiver's receipt," so called, issued from the land office and delivered to him. This receipt was recorded in the recorder's office of Clear Creek county, Colo., and on April 20th Turner conveyed to appellants Allison and McClelland each an undivided one-quarter interest in the lode. Whether he procured such receiver's receipt by fraudulent and false representations, as charged in the bill, it is unnecessary to determine. It is clear, to put upon it the construction most favorable to him, that he acted under a misapprehension of his legal rights. There is nothing in the records showing that he ever became possessed of Sawyer's interest in the lode. Assuming that, under the proceedings in the Teal suit, he had acquired the legal title to Sanderson's interest, he became merely a tenant in common with Sawyer, and his subsequent acquisition of the legal title from the land office inured to the benefit of his co-tenants as well as himself. It is well settled that co-tenants stand in a certain relation to each other of mutual trust and confidence; that neither will be permitted to act in hostility to the other in reference

to the joint estate; and that a distinct title acquired by one will inure to the benefit of all. A relaxation of this rule has been sometimes admitted in certain cases of tenants in common who claim under different conveyances and through different grantors. However that may be, such cases have no application to the one under consideration, wherein a tenant in common proceeds surreptitiously, in disregard of the rights of his co-tenants, to acquire a title to which he must have known, if he had made a careful examination of the facts, he had no shadow of right. We think the general rule, as stated in *Bissell* v. *Foss*, 114 U. S. 252, 259; 5 Sup. Ct. 851, should apply; that "such a purchase (of an outstanding title or incumbrance upon the joint estate for the benefit of one tenant in common) inures to the benefit of all, because there is an obligation between them, arising from their joint claim and community of interest; that one of them shall not affect the claim to the prejudice of the others." *Rothwell* v. *Dewees*, 2 Black, 613; *Van Horne* v. *Fonda*, 5 Johns. Ch. 388; *Lloyd* v. *Lynch*, 28 Pa. St. 419; *Downer* v. *Smith*, 38 Vt. 464.

A title thus acquired the patentee holds in trust for the true owner, and this court has repeatedly held that a bill in equity will lie to enforce such trust. *Johnson* v. *Towsley*, 13 Wall, 72; *Moore* v. *Robbins*, 96 U. S. 530: *Marqueze* v. *Frisbe*, 101 U. S. 473; *Rector* v. *Gibbon*, 111 U. S. 276, 291; 4 Sup. Ct. 605; *Cattle Co.* v. *Becker*, 147 U. S. 47; 13 Sup. Ct. 217.

It is contended, however, that Sawyer is precluded from maintaining this bill by the fact that he filed no adverse claim to the lode in question under Rev. St. section 2325. This section declares that, "if no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of sixty days of publication" of notice of application for patent, "it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper

officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter." By section 2326, "where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim," etc. In this case there was no conflict between different locators of the same land, and no contest with regard to boundaries or extent of claim, such as seems to be contemplated in these provisions. Turner did not claim a prior location of the same lode, and made no objection to the boundaries or extent of Sawyer's claim, but asserted that he had acquired Sawyer's title by legal proceedings. The propriety of such claim was not a question which seems to have been contemplated in requiring the "adversing" of hostile claims. In this particular the case of *Garland* v. *Wynn*, 20 How. 6, is in point. In that case it was held that where the register and receiver of public lands had been imposed upon by ex parte affidavits, and a patent had been obtained by one having no interest secured to him in virtue of the pre-emption laws, to the destruction of anothers right who had a preference of entry, which he preferred and exerted in due form, but which right was defeated by false swearing and fraudulent contrivance brought about by him to whom the patent was awarded, that the jurisdiction of the courts of justice was not ousted by the regulations of the commissioner of the general land office. "The general rule is," says Mr. Justice Catron, "that where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and the government, regardless of the rights of others, the latter may come into the ordinary courts of justice and litigate the conflicting claim." Such was the case of *Comegys* v.

Vasse, 1 Pet. 193, 212, and the case before us belongs to the same class of ex parte proceedings; nor do the regulations of the commissioner of the general land office, whereby a party may be held to prove his better claim to enter, oust the jurisdiction of the courts of justice. We announce this to be the settled doctrine of this court. See, also, *Cattle Co.* v. *Becker*, 147 U. S. 47, 57; 13 Sup. Ct. 217, and cases cited.

The judgment of the court below was right, and it is therefore

Affirmed.

JAMES P. MATTINGLY ET AL. V. LEONARD LEWISOHN.

(13 Montana 508; 35 Pac. 111. Supreme Court. Dec. 23, 1893.)

Appeal from judgment that neither party is owner. When in an adverse claim suit the finding is that neither party is entitled to possession, from which decision one party appeals and the judgment is reversed, the whole case is reopened and the judgment is not *res adjudicata* as to either party.

Jury verdict as to non-performance. The appellate court will not reverse a finding on the question of labor performed where there is evidence sufficient to uphold such finding.

[1]**The location certificate** in Montana is required by statute to be verified.

Annual labor need not be proved in an adverse case when it is not made an issue by the pleadings. The plaintiff in this case had denied performance by the defendant, but defendant made no issue of non-performance by plaintiff.

Misrecital of amounts in charge of court. The court instructed the jury that $75 of the annual labor was not in dispute, but as to the remaining $25, there was contention. In fact $78.50 of the total $100 was conceded: *Held*, immaterial error.

Form of instruction as to annual labor. An instruction which literally states the requirements of the law, is not too rigid in requiring proof of the full performance of the minimum amount fixed by the statute.

[2]**The test of the valuation of the annual labor** is what it was reasonably worth, not what was paid for it, nor the contract price.

Appeal from District Court, Silver Bow County; John J. McHatton, Judge.

[1]*Van Buren* v. *McKinley*, (Idaho) 66 Pac. 936.

[2]*Coleman* v. *Curtis*, 12 Mont. 301; 30 Pac. 266. *Wright* v. *Killian*, 132 Cal. 56; 64 Pac. 98.

On contradictory evidence doubt to be decided in favor of the work. *Strasburger* v. *Beecher*, 20 Mont. 143; 49 Pac. 740.

Burden of proof on party alleging non-performance. *Dibble* v. *Castle Chief Co.* 9 So. Dak. 618; 70 N. W. 1055. *Harris* v. *Kellogg*, 117 Cal. 484; 49 Pac. 708. *Axiom Co.* v. *White*, 10 So. Dak. 198; 72 N. W. 462. *Providence Co.* v. *Burke*, (Ariz.) 57 Pac. 641; 19 M. R.—. *Beals* v. *Cone*, 27 Colo. 473, 62 Pac. 938.

Proof of failure to perform must be clear. *Crown Point Co.* v. *Crismon*, 39 Oreg. 364; 65 Pac. 87.

Whether work done on one of the group was for the benefit of the claim in contention is a jury question. *Wilson* v. *Triumph Co.* 19 Utah 66; 56 Pac. 300. *Yreka Co.* v. *Knight*, 133 Cal. 544; 65 Pac. 1091. *Hall* v. *Kearny*, 17 M. R. 594.

Action by James P. Mattingly and others against Leonard Lewisohn to determine the right of possession to a quartz lode mining claim. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

Statement of the case by HARWOOD, J.:

Among other assignments, appellant's counsel criticise as erroneous certain instructions, numbered 1, 3, 4, 5, and 6, given by the court to the jury, as follows:

(1) "A location of a quartz lode claim is made by complying with the requirements of the laws of the United States and of the territory or state of Montana, and such requirements are as follows: to wit; There must be discovered within the limits of the claim located a vein or crevice of quartz or other rock in place, bearing gold, silver, or other precious metals, and the vein or crevice must have at least one well-defined wall rock. The location must be so well and distinctly marked on the ground that its boundaries can be readily traced. And within twenty days after making the location the locator or locators must file and have recorded, in the office of the county recorder of the county in which the claim is situated, a declaratory statement, on oath, containing the names of the locators, the date of the location and such a description of the claim located, with reference to such natural objects or permanent monuments as will identify the claim. The claim located may equal, but can not exceed, 1,500 feet in length along the vein, and 300 feet in width on each side of the center of the vein. The locator or locators must be citizens of the United States, or must have declared their intention to become such."

(3) "It is not alleged or pleaded, on the part of the defendant, that the plaintiffs have forfeited the ground in controversy in this action by reason of a failure to perform the labor or make the improvements required by law, and there

is no necessity for plaintiffs to prove such representation; but if you find the ground in controversy herein was on the 1st day of January, 1885, vacant and unappropriated ground, and that the plaintiffs or those under whom the plaintiffs claim, located the same according to the law as given you in the instruction herein, then you will inquire no further, but will find a verdict for the plaintiffs."

(4) "The plaintiffs in this action deny the location of the Miners' Union lode claim, and also allege that the said claim, if it ever was located, has been forfeited by a failure on the part of the defendants and their predecessors in interest to perform the labor or make the improvements required by law during the year 1884; and if the jury find from the evidence, either that there was no location of the Miners' Union lode claim, or that the same was forfeited for failure to perform the labor or make the improvements required by law, then, in either case, the ground would be subject to location, and if the plaintiffs complied with the requirements of the law, as hereinbefore given, in making their location, then the jury are instructed to find for the plaintiffs."

(5) "If you find from the evidence that, although Fisher may have made a valid location of the said Miners' Union claim, but he or his successors in interest failed to do one hundred dollars' worth of work, or to place one hundred dollars' worth of improvements, on the said claim in the year of 1884, the ground was subject to relocation on the 1st day of January, 1885.

"It is claimed, and there is no dispute, that seventy-five dollars' worth of work was done on the said claim by Jacobs, and the controversy between the respective parties is as to whether or not Carroll, or either of them, did the other twenty-five dollars' worth of work, upon which point there is a conflict of testimony, and you will be the exclusive judges of the weight to be given to the testimony of the respective witnesses, and their credibility, as well as their means of

knowledge; and that if you find that there was not twenty-five dollars' worth of work done by the said Carroll, or, in other words, if you find that there was not one hundred dollars' worth of work done by all the claimants of the said Miners' Union lode claim, you will find that the said claimants forfeited all right and title to the same, and the said ground was on the 1st day of January, 1885, subject to relocation, and if there was any amount less than one hundred dollars' worth done, in the eye of the law, it occupies the same position, and their claim was forfeited, as much so as if they had done none at all, for the law says that there shall be one hundred dollars' worth of work done. or improvements made, on a claim, for each year."

(6) "In determining the amount of work done upon a claim, or improvements put thereon for the purpose of representation, the test is as to the reasonable value of the said work or improvements, not what was paid for it, or what the contract price was, but it depends entirely upon whether or not the said work or improvements were reasonably worth the said sum of one hundred dollars."

The other facts are stated in the opinion.

M. KIRKPATRICK, for appellant.

F. T. MCBRIDE, and ROBINSON & STAPLETON, for respondents.

HARWOOD, J. This action was instituted pursuant to the provisions of section 2326, Rev. St. U. S., to determine the right of possession to a certain quartz lode mining claim, situate in Silver Bow County, Mont., as between appellant, who was applicant for a patent thereto under the name of "Miners' Union Lode Mining Claim," and the respondents, who were the adverse claimants, with others, of said ground, under a location known as the "Great Eastern Quartz Lode Mining Claim."

The case has been pending since 1886, and the present appeal is from the judgment rendered as the result of a second trial, wherein it was determined, for the second time, that appellant, Lewisohn, failed to establish title and right of possession to said ground, and also an appeal from an order overruling his motion for new trial.

The first and most important question presented on this appeal is as to the effect of the first trial, the judgment, and reversal of that judgment by the Supreme Court on a former appeal.

The report of the consideration and determination of the case on the former appeal is found in 8 Mont. 259; 19 Pac. 310, and, as there shown, the first trial resulted in findings to the effect that neither party had established a title to the ground in dispute, and judgment was pronounced accordingly.

Defendant prosecuted an appeal from the whole of said judgment, assigning certain errors alleged to have been committed by the court below in the trial, by way of ruling out certain evidence offered by defendant, and also assigning and urging the proposition that the complaint, as originally filed, failed to state facts sufficient to constitute a cause of action, which last objection was also raised in the court below by demurrer to the complaint. The Supreme Court considered, as appears from the opinion cited *supra*, but one question on that appeal, namely, whether or not the complaint was sufficient, and held that it was not, and thereupon reversed the judgment and remanded the case, with direction to the trial court to sustain the demurrer to the complaint.

Thereafter, on return of remittitur, plaintiffs filed an amended complaint, by leave of court, which complaint was afterwards further amended by leave of court, setting up, substantially, the facts pleaded in the original complaint, and also undertaking to make the complaint sufficient in the respects wherein

it was found wanting on the former adjudication. Now, defendant, who had appealed, and caused the former judgment to be reversed, as aforesaid, moved the trial court to strike the amended complaint from the files of said court, on the ground that the facts set up by plaintiffs, whereby they claimed title and right of possession to said ground in dispute, had been adjudicated and determined against them, and that such determination had not been vacated on appeal. This position was taken by defendant on the theory that the former judgment against plaintiffs, declaring them without title to said mining ground, still stood in full force and effect, notwithstanding the appeal, and reversal of said judgment. The trial court, however, overruled said motion to strike out plaintiffs' amended complaint, to which ruling exception was reserved by defendant; and that question is here presented on this appeal, as the main question for determination.

Appellant contends that the reversal of the case on the former appeal was only a vacation of the judgment, as to its effect in determining that defendant was without title or right of possession to the ground in dispute.

The conclusion reached by this court upon consideration of that question is that appellant cannot be sustained in his contention that the former judgment, after reversal, still stood in full force and effect against the plaintiffs. If the former appeal had been taken distinctly from part of the judgment, (*Bank* v. *Fuqua*, 11 Mont. 285; 28 Pac. 291,) and the same had been reversed as to the part only relating to defendant's rights and claim upon said ground, for error committed in respect to that determination, there would, undoubtedly, be great force in the position contended for by appellant; but the judgment was reversed because the complaint was found wanting in the attempt to state a sufficient cause of action, and a reversal of the judgment, unconditionally, on such a ground, would seem to have entirely vacated it, together with all proceedings subsequent to the

demurrer. The Supreme Court held, on the appeal, that the case had never been properly in court, and that the demurrer interposed to the original complaint ought to have been sustained; and for that cause the Supreme Court held that the judgment must be reversed, treating all proceedings subsequent to the demurrer as null and void. We think, in such a determination as that, it cannot be maintained that the judgment still stands in force as an adjudication and determination of the rights of plaintiffs in that action. To hold with appellant on this point would be to declare such a judgment as existing, valid, and binding, in certain respects, while at the same time holding that part of the judgment roll which is necessary to sustain the judgment was wanting, and also holding that for that reason the judgment should be reversed and set aside, root and branch. Such a position, we think, is untenable. If, on the former appeal, appellant had so shaped his course as to have attacked rulings which related to the action and judgment on the branch of the case concerning the determination of his alleged rights in and to said land, and had appealed from that part of the judgment only, and the Appellate Court, in considering such appeal, had confined its inquiries and determination to the portion of the judgment relating to defendant's claim to said ground alone, and reversed the judgment only in its effect against defendant, then, of course, it might have been left in force as an adjudication and determination of the claims of plaintiffs to said ground; this being an action where either party must, independently, make out a complete case on his own behalf in order to obtain a judgment. But, as we have seen, that was not the character of appeal, nor was the determination so limited on the former appeal of this case, for by that determination the parties were relegated back to the position they occupied when demurrer to the original complaint was under consideration in the trial court. The

ruling of the trial court, therefore, in refusing to strike out the amended complaint filed after the former reversal, we think, ought to be sustained. *Mattock* v. *Goughner*, 13 Mont. 300; 34 Pac. 36.

Appellant further contends that the special finding of the jury on the present trial, to the effect that defendant failed to improve said mining claim to the extent of not less than $100 worth of work or improvements thereon in the year 1884, was not sustained by the evidence. We have carefully considered the evidence contained in the record, relating to this question, and from that examination are drawn to the conclusion that the special finding of the jury in that respect is undoubtedly supported by the evidence. Indeed, we think a finding to the contrary might be gravely questioned, as to whether, with all warrantable liberality of construction, the evidence could be held sufficient to support a conclusion that the necessary work or improvement to fulfill the requirements of the law was expended upon said mining claim in the year 1884. The jury found the contrary, and in our opinion such finding is amply supported by the evidence, and that the ruling of the trial court, in refusing to disturb that finding ought not to be reversed.

It is further urged that the trial court committed errors of law, in giving certain instructions to the jury. The instructions criticised are set forth in the above statement of the case. It is assigned that instruction No. 1 is erroneous because the court, in defining the requisites of a valid mining location, stated, among other essentials, that the locator must, within 20 days after making the location, "file and have recorded, in the office of the county recorder of the county in which the claim is located, a declaratory statement, on oath, containing," etc. The clause, "on oath," appearing in said instruction is objected to. But in view of the requirements of the statute, and the decisions wherein the same question has been considered, we think the court

correctly stated the law. *Metcalf* v. *Prescott*, 10 Mont. 283, 25 Pac. 1037, and cases therein cited.

Instructions Nos. 3 and 4 are also objected to, on the ground that the jury was thereby informed "that it was not necessary for plaintiffs to prove compliance with the law as to performance of annual work on the Great Eastern Claim." By reference to those instructions, it will be seen the jury was thereby told that the pleadings raised no issue in respect to the representation of said "Great Eastern Mining Claim" by proper expenditure in labor or improvements thereon, as required by law. The instruction says: "It is not pleaded on the part of defendant that the plaintiffs have forfeited the ground in controversy by reason of a failure to perform the labor or make the improvements required by law, and there is no necessity for plaintiffs to prove such representation." There being no issue raised on that point by the pleadings, but, on the contrary, the fact of such representation of the Great Eastern Claim being admitted, or not put in controversy, the instruction was correct. *Wulf* v. *Manuel*, 9 Mont. 286, 23 Pac. 723.

Instruction No. 5 is criticised as erroneous because "it states that there is no dispute that $75 worth of work was done on the Miners' Union in 1884, but that as to the remaining $25 the fact is disputed, and the evidence conflicting." In this connection, appellant's counsel say: "It is conceded that $78.50 worth of work was done in 1884. Jacobs, the plaintiffs' witness, credits Carroll with one day's work, at $3.50, which, added to the $75 worth done by Jacobs and Hussleton, amounts to $78.50; so that the amount left in dispute, and as to which there is conflicting evidence, is not $25, but $21.50." Even granting all that appellant claims in this connection, with full force, we still deem the language of the instruction void of prejudice on the point of its attempted criticism. The court said to the jury, in that instruction, that the dispute was concerning $25 worth

of work or improvements on the claim in that year, in addition to the $75 worth admitted,—in other words, that was the scope of the controversy on that point; and the court did not say that proof of the performance of some, or even all, of that $25 worth of work had not been made. But the jury were left free to so find, if it could be found from the evidence. It is also urged against this instruction that "it is likewise erroneous in exacting too rigid a compliance with the letter of the mining laws" in respect to the amount of work or improvements required for representation. We do not find in this instruction any rigid exaction, which demands from appellant any greater measure than the law requires in return for the grant of a mining claim. The instruction simply and plainly states what the law requires. There is no error in stating the conditions which must be complied with in order to invest the locator of a mining claim on the public domain with exclusive right of possession, and enjoyment thereof. Nor do we observe anything rigid or formidable in the form of this instruction. Of course, an instruction which states the requirements of the law may seem quite rigid to one who, by dint of the utmost stretch, cannot show fulfilment. But the objection, then, is against the law, instead of the instruction which states the law; and the law appears rigid only when it lays its rule upon delinquency, and finds it wanting. We cannot sustain the objection to instruction No. 5.

Lastly, instruction No. 6 is attacked as erroneous because the jury are thereby told that: "In estimating the amount of work or improvements, the test is the reasonable value thereof, not what was paid for it, or what the contract price was, but it depends entirely upon whether or not said work or improvements were reasonably worth the sum of $100." In this connection, appellant's counsel argue that the "intrinsic value or worth of the property may be nothing at all. If the amount of labor put into it

was worth $100, it is sufficient." We do not regard the language of the instruction fairly susceptible of a construction antagonistic to the view of appellant's counsel. Indeed, it seems to us that the court is in accord with them, in saying to the jury. "In estimating the amount of work or improvements, the test is the reasonable value thereof." The court here said to the jury, "It is the reasonable value of the work or improvements which you must consider." The court certainly did not, in that instruction, say that the value of the claim, with such work or improvements thereon, or the value of the work or improvements to the claim, was the criterion for ascertaining whether the requirements of the law had been fulfilled; and we do not think a jury would be mislead in construing or applying the language used by the court, especially in view of the fact that the evidence on that point is directed to the ascertainment of the value of the work or improvements put upon the mine, irrespective of the value of the mining claim, or the propriety or expediency of making the improvement or working it in the manner shown, or inquiring how much it enhanced the value of the claim.

Upon careful consideration of these instructions, in the light of the criticism brought to bear on them by the learned counsel for appellant, we think, taken in connection with the other instructions given, they plainly and sufficiently state the law applicable to the case, as developed in the pleadings and evidence.

The conclusion of this court, upon all the errors assigned, is that judgment of the court below, and the order overruling appellant's motion for a new trial, should be affirmed.

Affirmed.

PEMBERTON, J., and DE WITT, J., concur.

[1]HARRIET DOWER ET AL. v. PHILIP RICHARDS ET AL.

(151 U. S. 658; 14 Sup. Ct. 452. Supreme Court. Feb. 4, 1894.)

[2]**Lode in town-site. Once valuable, later abandoned and again found valuable.** Under the statutes of the United States, a ledge containing gold-bearing rock, which has formerly been profitably worked for mining purposes, but all work upon which has been abandoned, and which, at the date of a town-site patent of the land within which it lies, is not known to be valuable for mining purposes, is not excepted from the operation of the town-site patent, although, after the town-site patent has taken effect, the land is found to be still valuable for mining purposes.

No federal question on a finding of fact. The rule that the supreme court has no authority to review questions of fact upon error extends to a case in which a state supreme court finds against the existence of a fact relied upon by the plaintiff in error as raising a federal question; as, where he contended that the granting of a town-site patent on lands known to be valuable for mining purposes did not prevent the subsequent location of a mining claim thereon, and the court found that the lands were not known to be valuable for mining at the time the patent took effect.

In error to the Supreme Court of the State of California. Affirmed.

[1]Case below, 81 Cal. 44; 22 Pac. 304. Same ruling in similar case between same parties, 73 Cal. 477; 15 Pac. 105.

[2]*Bonner* v. *Meikle*, 82 Fed. 697; 18 M. R.—

There must be an existing paying mine to make it an exception to the town-site patent. *Smith* v. *Hill*, 89 Cal. 122; 26 Pac. 644.

The mining claims excepted from patent are only those then lawfully existing and of known sufficient value to justify expenditures. *Davis* v. *Weibbold*, 139 U. S. 507.

The town takes no title to lode known to exist. *Moyle* v. *Bullene*, 7 Colo. App. 308; 44 Pac. 69.

The lot owner holds as against a lode claimant having no valid discovery of valuable mineral. *Regan* v. *Whittaker*, 14 S. D. 373; 85 N. W. 863.

A mining claim need not adverse a town-site application. *Silver Bow Co.* v. *Clarke*, 5 Mont. 378; 5 Pac. 570. See *Talbott* v. *King*, 6 Mont. 76; 9 Pac. 434. *Smokehouse lode cases*, 6 Mont. 397; 12 Pac. 858.

Town-site patent does not convey prior mining claim located thereon. *Silver Bow Co.* v. *Clarke*, 5 Mont. 378; 5 Pac. 570.

H. L. GEAR, for plaintiffs in error.

P. F. SIMONDS, for defendants in error.

Mr. Justice GRAY delivered the opinion of the court.

This was an action of ejectment, brought November 15, 1887, by the executors of Philip Richards against Harriet Dower and others, in the superior court for the county of Nevada, in the state of California, to recover possession of two lots in the city of Nevada in that county, which the complaint alleged that Richards, in his lifetime, was the owner and in possession of.

The defendants, in their answer, alleged that Harriet Dower, of whom the other defendants were servants, was the owner and in possession, and entitled to the possession, of a quartz ledge and mine, called the "Wagner Ledge," situated partly upon and crossing the lots demanded; that Richards had no other right of possession than under a town-site patent granted by the United States to the city of Nevada in 1869; that the ledge was known to be a gold-bearing ledge, and was held and worked as such long prior and subsequent to that patent, and was by the laws of the United States excepted from that patent; and that Harriet Dower had located the ledge, and was engaged in working it, including 300 feet on either side thereof, under those laws. The laws relied on by the defendants were the acts of July 26, 1866, c. 262; March 2, 1867, c. 177, (14 Stat. 251, 541;) June 8, 1868, c. 53, (15 Stat. 67;) May 10, 1872, c. 152, (17 Stat. 91;) Rev. St. § 2392.

A jury trial was waived, and the case submitted to the Superior Court, which made findings of fact, in substance, as follows: A town-site patent for a tract including the two lots demanded was issued July 1, 1869, by the United States to the city of Nevada, which, before May 1, 1887, conveyed all its

title in these lots to Richards, and that title was now vested in the plaintiffs as his executors. Before the issue of that patent, the Wagner ledge was known to exist as a gold-bearing quartz lode, but had never been located or marked out; and there was no proof that any local mining rules were in force in that district. For many years before 1869 it had been profitably worked, and many tons of gold-bearing rock extracted from it, by persons who were trespassers upon the public domain, and were not shown to have had more than a mere *possessio pedis* of certain shafts, tunnels, and dumps. In the winter of 1868–69, work on the ledge was abandoned, and no work was afterwards done by those persons, and the defendants did not claim under them. In 1884, Harriet Dower, being a citizen of the United States, and qualified to make a mining location, attempted to make a quartz mining location upon the ledge within the lots demanded, which, in manner and form, complied with the laws of the United States in respect to mining locations; and by virtue of her location she claimed the ledge, with 300 feet on each side thereof, and since did annual work thereon, as required by those laws, excavated the soil, sank shafts, erected buildings, and piled earth, sand, and *debris* across the surface of the lots. For more than a year before her attempted location, no annual work had been done by any one upon the ledge. On May 1, 1887, Richards was the owner and in possession, and entitled to the possession, of the lots, and the defendants wrongfully and unlawfully ejected him from the part claimed by them, and ever since wrongfully and unlawfully withheld the possession thereof from him and his executors.

Upon the facts so found, the court decided, as matter of law, that the plaintiffs were owners, and entitled to the possession, of the lots; that no part of them was subject to location as a mining claim at the date of Harriet Dower's attempted location; that the whole of these lots passed to Richards by

the town-site patent and the subsequent conveyance; and that the plaintiffs were entitled to judgment against the defendants for the restitution of the part claimed by the latter, and for costs—and gave judgment for the plaintiffs accordingly. Upon a statement of the evidence, agreed to in writing by counsel, and certified by the judge, a motion for a new trial was made and denied. From the judgment for the plaintiffs, and from the order denying a new trial, the defendants, in accordance with the state practice, appealed to the Supreme Court of the state.

That court, as stated in its opinion filed in the case, and reported in 81 Cal. 44; 22 Pac. 304, affirmed the judgment upon the following grounds: Upon the facts found and the evidence stated in the record before that court, it decided, as matter of fact, that before 1869 a gold-bearing quartz ledge was known to exist, and had been profitably worked, within the limits of these lots, but had never been located or marked out; that, in the winter of 1868–69, all work on the ledge was abandoned, and no work was afterwards done there until one of the defendants, in 1884, made the location under which they claimed; that from the time when work was so abandoned until July 1, 1869, when the town-site patent was granted, the portion of the ledge included within the boundaries of these lots was regarded as worked out, and as of no further value for mining purposes, and was not known to be valuable for mining purposes at the date of that patent, nor discovered to be so before the plaintiffs and their predecessors occupied and improved the lots for the purpose of residence under the town-site patent. Having decided that to be the state of facts at the time when the town-site patent took effect, and assuming that the provision of the act of March 2, 1867, that no title should be acquired by a town-site patent "to any mine of gold, silver, cinnabar, or copper," was not repealed by the provision of the act of June 8, 1868, c. 53, that no title should be so acquired to "any valid mining claim or possession held under

the existing laws of Congress," but stood with it, as in the reenactment of both provisions in section 2392 of the Revised Statutes, the court decided, as matter of law, that land not known at the time to be valuable for minerals was not excepted from the operation of a town-site patent, even if afterwards found to contain minerals which might be profitably worked. The defendants thereupon sued out this writ of error.

The only federal question presented by the writ of error is whether there was error in this decision in matter of law.

The proposition of law on which the plaintiffs in error rely is thus stated in their brief: "When a quartz ledge, known to be gold-bearing, and to have been profitably worked prior to the acquisition of a town-site patent in the year 1869, and not then worked out, is situated within the exterior boundaries of the patent," "the rights of the government and its mining grantees are not limited to such actual mining or tunnel possession as may have existed before the town-site patent, or to any continuance of a mining claim or possession by prior locators or their grantees, but the government owns and can grant the right to any quartz mine or gold-bearing ledge which was known to exist and to be valuable for minerals before the town-site patent was obtained, and which was not worked out when the town-site patent was obtained; and the rights of a subsequent locator under the government, by virtue of its reservation of the mine, and of the mining acts of 1866 and 1872, include a reasonable quantity of surface for the convenient working of the ledge, not exceeding three hundred feet on each side thereof."

The essential difference between this proposition and that affirmed by the Supreme Court of the state of California is that the plaintiffs in error insist that if the ledge in question was known to have been gold-bearing, and to have been profitably worked, before the acquisition of the town-site patent, and had not, in fact, been worked out before the acquisition

of that patent, the right to that ledge was not included in the patent, but was reserved to the United States, and would pass by a subsequent mining location; whereas the court held that if the ledge was not known, at the time of the acquisition of the town-site patent, to contain such an amount of minerals as to be valuable for mining purposes, it was not excepted from the operation of that patent.

There can be no doubt that the decision of the Supreme Court of the state in this respect was correct. It is established by former decisions of this court that, under the acts of Congress which govern this case, in order to except mines or mineral lands from the operation of a town-site patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the town-site patent takes effect, but they must, at that time, be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them; and, if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the town-site patent. *Deffeback* v. *Hawke*, 115 U. S. 392; 6 Sup. Ct. 95; *Davis* v. *Weibbold*, 139 U. S. 507; 11 Sup. Ct. 628.

The principal ground on which the plaintiffs in error seek to reverse the judgment of the Supreme Court of California is that its decision, in matter of fact, was erroneous, and contrary to the weight of the evidence in the case; but to review the decision of the state court upon the question of fact is not within the jurisdiction of this court.

In the legislation of Congress, from the foundation of the government, a writ of error which brings up matter of law only, has always been distinguished from an appeal, which unless expressly restricted, brings up both law and fact. *Wiscart* v. *D'Auchy*, 3 Dall. 321; *U. S.* v. *Goodwin*, 7 Cranch. 108; *Cohens* v. *Virginia*, 6 Wheat. 264, 410; *Hemmenway* v.

Fisher, 20 How. 255, 258; *In re Neagle*, 135 U. S. 1, 42; 10 Sup. Ct. 658.

In the first judiciary act the whole appellate jurisdiction of this court was limited to matters of law. While an appeal lay from the District Court to the Circuit Court in admiralty cases, neither the judgments or decrees of the Circuit Court, whether in law, equity, or admiralty, nor judgments or decrees of the highest court of a state, could be reviewed by this court, except by writ of error. Act Sept. 24, 1789, c. 20, §§ 19, 22-25. (1 Stat. 83-86.)

Under that act it was held that a decree in admiralty could not be reviewed by this court in matter of fact; and Chief Justice Ellsworth, after laying down the rule that the appellate jurisdiction of this court could only be exercised within the regulations prescribed by Congress, said: "It is to be considered, then, that the judicial statute of the United States speaks of an 'appeal' and of a 'writ of error'; but it does not confound the terms, nor use them promiscuously. They are to be understood, when used, according to their ordinary acceptation, unless something appears in the act itself to control, modify, or change the fixed and technical sense which they have previously borne. An appeal is a process of civil-law origin, and removes a cause entirely, subjecting the fact, as well as the law, to a review and retrial; but a writ of error is a process of common-law origin, and it removes nothing for re-examination but the law." *Wiscart* v. *D'Auchy*, 3 Dall. 327; *The Perseverance*, 3 Dall. 336; *The Charles Carter*, 4 Dall. 22.

In 1803 Congress substituted an appeal from the Circuit Court to this court, instead of a writ of error, in cases in equity and in admiralty; and upon such an appeal the facts as well as the law were open to review in both those classes of cases until 1875, when the appeal in admiralty was restricted to questions of law. Act March 3, 1803, c. 40, (2 Stat. 244;) *The San Pedro*, 2 Wheat. 132; *The Baltimore*, 8 Wall. 377; Rev. St.

§ 692; Act Feb. 16, 1875, c. 77, § 1, (18 Stat. 315;) *The Francis Wright*, 105 U. S. 381.

Judgments of the Circuit Court in actions at law have remained reviewable by writ of error only. *Jones* v. *La Valette*, 5 Wall., 579; Act July 4, 1840, c. 43, § 3, (5 Stat. 393;) Rev. St. § 691. Upon such a writ of error, this court, as is well settled, cannot review a decision of a question of fact, even if by the local practice, as in Louisiana, the law and the facts are tried together by the judge without a jury.

In such a case, Mr. Justice Story said: "We have no authority, as an Appellate Court, upon a writ of error, to revise the evidence in the court below, in order to ascertain whether the judge rightly interpreted the evidence, or drew right conclusions from it. That is the proper province of the jury, or of the judge himself, if the trial by jury is waived, and it is submitted to his personal decision." *Hyde* v. *Booraem*, 16 Pet. 169, 176.

In a petitory action, in the nature of ejectment, to recover land in Louisiana, the subject was fully explained by Chief Justice Taney, who (according to the original opinion on file, misprinted in some particulars in the official report) said: "According to the laws of that state, unless one of the parties demands a trial by jury, the court decides the fact as well as the law; and, if the judgment is removed to a higher court for revision, the decision upon the fact as well as the law is open for examination in the Appellate Court. The record transmitted to the Superior Court, therefore, in the state practice, necessarily contains all the evidence offered in the inferior court; and, as there is no distinction between courts of law and courts of equity, the legal and equitable rights of the parties are tried and decided in the same proceeding. In the courts of the United States, however, the distinction between courts of law and of equity is preserved in Louisiana as well as in the other states; and the removal of the case from the Circuit Court to this court is regulated by act of Congress, and not

by the practice of Louisiana; and the writ of error, by which, alone, a case can be removed from a Circuit Court when sitting as a court of law, brings up for revision here nothing but questions of law; and if the case has been tried according to the Louisiana practice, without the intervention of a jury, the decisions of the Circuit Court upon questions of fact are as conclusive as if they had been found by the jury." The chief justice stated that, upon the first argument of the case at a former term, the court, its attention "not having been drawn to the difference between an appeal in the state practice and the writ of error from this court," and being of opinion that the weight of evidence was against the authenticity of an instrument under which one of the parties claimed title, and which the Circuit Court had held to be authentic, therefore, reversed the judgment of that court; but that this court, upon reconsideration, was "unanimously of opinion that the decision of the Circuit Court upon this question of fact must, like the finding of a jury, be regarded as conclusive; that the writ of error can bring up nothing but questions of law; and that, in deciding the question of title in this court, the paper referred to must be treated and considered as authentic and sufficiently proved"—and had therefore ordered the case to be reargued. *U. S.* v. *King*, 7 How. 833, 844, 845. Upon the final argument, while four of the justices dissented from the opinion of the court upon the principal question of law presented by the record, none of them differed from the chief justice on the question of practice; and Mr. Justice Wayne, who delivered the principal dissenting opinion said: "No point has been more repeatedly and authoritatively settled than that this court will not, upon a writ of error, revise or give judgment as to the facts, but takes them as found by the court below, and as they are exhibited by the record." 7 How. 865. See, also, *Parks* v. *Turner*, 12 How. 39, 43; *Arthur* v. *Hart*, 17 How. 6, 12; *Lanfear* v. *Hunley*, 4 Wall. 204, 209;

Generes v. *Campbell*, 11 Wall. 193; *Jeffries* v. *Insurance Co.* 110 U. S. 305, 309; 4 Sup. Ct. 8.

The only appellate jurisdiction which has ever been conferred by Congress upon this court to review the judgments or decrees, at law or in equity, of the highest court of a state, has been by writ of error. *Cohens* v. *Virginia*, 6 Wheat. 264, 410; *Verden* v. *Coleman*, 22 How. 192; Act Sept. 24, 1789, c. 20, § 25, (1 Stat. 85;) Act. Feb. 5, 1867, c. 28, § 2, (14 Stat. 386;) Rev. St. § 709; Act March 3, 1891, c. 517, § 5, (26 Stat. 827).

Such a writ of error can be sustained only when the decision of the state court is against a right claimed under the constitution and laws of the United States. *Montgomery* v. *Hernandez*, 12 Wheat. 129; *Missouri* v. *Andriano*, 138 U. S. 496, 11 Sup. Ct. 385. And if the decision of the state court rests on an independent ground of law, not involving any federal question, this court has no jurisdiction. *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18; 8 Sup. Ct. 741; *Eustis* v. *Bolles*, 150 U. S. 361; 14 Sup. Ct. 131; *California Powder Works* v. *Davis*, 151 U. S. 389; 14 Sup. Ct. 350. The reasons against its jurisdiction are as strong, if not stronger, when the decision of the state court proceeds upon matter of fact only.

When, indeed, the question decided by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of federal law, the decision may be reviewed by this court. It was accordingly said by Mr. Justice Catron: "The powers of the Supreme Court are limited, in cases coming up from the state courts, under the twenty-fifth section of the judiciary act, to questions of law, where the final judgment or decree draws in question the validity of a treaty or statute of the United States, etc., or where their construction is drawn in question, or an authority exercised under them; and as the admission of evidence to establish the

mere fact of boundary in regard to the extent of grant cannot raise a question involving either the validity or construction of an act of Congress, etc., this court has no jurisdiction to consider and revise the decision of a state court, however erroneous it may be, in admitting the evidence to establish the fact; but when evidence is admitted as competent for this purpose, and it is sought to give it effect for other purposes which do involve questions giving this court jurisdiction, then the decisions of state courts on the effect of such evidence may be fully considered here, and their judgments reversed or affirmed, in a similar manner as if a like question had arisen in a Supreme Court of error of a state, when reversing the proceedings of inferior courts of original jurisdiction." *Mackay* v. *Dillon*, 4 How. 421, 447. The only questions of evidence considered in that case arose upon a bill of exceptions to the legal competency of evidence relied on to prove a title under an act of Congress.

Again, in *Almonester* v. *Kenton*, Mr. Justice Catron said: "Now, that this court has no jurisdiction, under the twenty-fifth section of the judiciary act of 1789, to re-examine the decision of a state court which drew in question the mere fact of where a dividing line between two tracts of land was, is too plain for discussion. Had the decision of the Supreme Court of Louisiana stopped here, then certainly jurisdiction would be wanting." 9 How. 1, 7. And this court assumed jurisdiction of that case solely because the state court had gone further, and had given a construction to an act of Congress.

So, in *Moreland* v. *Page*, this court dismissed a writ of error to review the judgment of a state court upon a question of the proper boundary between two tracts of land, although the owner of each claimed under a grant from the United States and Mr. Justice Grier, in delivering judgment, said: "It is a question of fact, depending on monuments to be found on the ground, documents in the land office, or the opinion of experts or surveyors appointed by the court or the parties. If

the accident to the controversy that both parties claim title under the United States should be considered as sufficient to bring it within our jurisdiction, then every controversy involving the title to such lands, whether it involve the inheritance, partition, devise, or sale of it, may, with equal propriety be subject to the examination of this court in all time to come." 20 How. 522, 523.

In *Lytle* v. *Arkansas*, in which the Supreme Court of Arkansas had decided against a pre-emptive right claimed under the laws of the United States, Mr. Justice Catron said: "It is not material whether the invalidity of the title was decreed in the Supreme Court of Arkansas upon a question of fact or of law. The fact that the title was rejected in that court authorizes this court to re-examine the decree." 22 How. 193, 203. Those observations must be taken as applied to the case before the court, in which the decision of the question of fact depended on the legal effect of acts of officers of the United States regarding that title; and that it was not intended to enlarge the scope of the appellate jurisdiction of this court is evident from the cases there cited. See, also, *Magwire* v. *Tyler*, 1 Black, 195, 203.

That this court, in an action at law, at least, has no jurisdiction to review the decision of the highest court of a state upon a pure question of fact, although a federal question would or would not be presented, according to the way in which the question of fact was decided, is clearly settled by a series of later decisions, some of them in cases very like the one now before us.

In *Lewis* v. *Campau*, (1865,) 3 Wall. 106, a decision of the state court as to the value of land conveyed by deed, upon which depended the requisite amount of stamps under the revenue law of the United States, was held not to be reviewable, although, if the value of the land had been admitted, a federal question would have been presented. *Hall* v. *Jordon*, 15 Wall. 393.

In *Boggs* v. *Mining Co.*, (1865,) a right of possession for the purpose of extracting gold from quartz rock was claimed "by a license inferred from the general policy of the state or of the United States in relation to mines of gold and silver and the lands containing them;" and a writ of error to review a decision of the Supreme Court of California against the claim was dismissed by this court, speaking by Chief Justice Chase, for the following reasons: "We doubt whether such a claim, even if made in the pleadings, would be such an allegation as would give jurisdiction to this court. However that may be, there was no decision of the court against the validity of such a license. The decision was that no such license existed; and this was a finding by the court of a question of fact upon the submission of the whole case by the parties, rather than a judgment upon a question of law. It is the same case, in principle, as would be made by an allegation, in defense to an action of ejectment, of a patent from the United States, with an averment of its loss or destruction, and a finding by the jury that no such patent existed, and a consequent judgment for the defendant. Such a judgment would deny, not the validity, but the existence, of the patent, and this court would have no jurisdiction to review it." 3 Wall. 304, 310.

In *Carpenter* v. *Williams*, (1869,) it was held that this court had no jurisdiction where the decision of the state court turned upon the identity of the person to whom a recorder of land titles confirmed, or intended to confirm, a lot of ground; and Mr. Justice Miller, in delivering judgment, said: "It is a mistake to suppose that every suit for real estate, in which the parties claiming under the federal government are at issue as to which of them is entitled to the benefit of that title, necessarily raises a question of federal cognizance. If this were so, the title to all the vast domain once vested in the United States could be brought from the state courts to this tribunal." 9 Wall. 785, 786.

In *Crary* v. *Devlin*, (decided Feb. 21, 1876,) in an action to recover the price of alcohol sold, the defendants contended that the sale was unlawful because of a violation of the internal revenue laws of the United States. The court of appeals of New York gave judgment for the plaintiff because no such violation was proved, and this court dismissed the writ of error upon the authority of *Boggs* v. *Mining Co.*, above cited; Chief Justice Waite saying: "There could have been no decision of the court of appeals against the validity of any statute of the United States, because it was found that the facts upon which the defendants below relied to bring their case within the statute in question did not exist. The judgment did not deny the validity of the statute, but the existence of the facts necessary to bring the case within its operation." 23 Lawy. Ed. U. S. Rep. 510, 511.

In *Republican River Bridge Co.* v. *Kansas Pac. R. Co.*, (decided a week later,) in an action at law concerning the title to real estate, in which each party claimed under a grant from Congress, a District Court of the State of Kansas, to which the case had been submitted without the intervention of a jury, made findings of fact, upon which it declared the law to be for the defendant. Its judgment was affirmed by the Supreme Court of the state, and the plaintiff sued out a writ of error from this court. Mr. Justice Miller, in delivering the opinion, said: "The finding by the District Court was received by the Supreme Court of the state as conclusive as to all facts in issue, and it is equally conclusive upon us. Where a right is set up under an act of Congress in a state court, any matter of law found in the record, decided by the highest court of the state, bearing on the right so set up under the act of Congress, can be re-examined here. In chancery cases, or in any other class of cases where all the evidence becomes part of the record in the highest court of the state, the same record being brought here, this court can review the decision of that court on both the law and the fact

so far as may be necessary to determine the validity of the right set up under the act of Congress; but in cases where the facts are submitted to a jury, and are passed upon by the verdict, in a common-law action, this court has the same inability to review those facts, in a case coming from a state court, that it has in a case coming from a Circuit Court of the United States. This conclusiveness of the facts found extends to the finding by a state court to whom they have been submitted by waiving a jury, or to a referee, where they are so held by state laws, as well as to the verdict of a jury." And *Boggs* v. *Mining Co.*, and *Crary* v. *Devlin*, above cited were referred to as supporting this conclusion. 92 U. S. 315–317; 23 Lawy. Ed. U. S. Rep. 515, 516.

Whether the suggestion in that opinion as to the power of this court, in chancery cases, to review the decision of a state court on both the law and the fact, is to be limited to cases in which the decree of that court is general upon the whole record, without specifically passing upon any question of fact and whether the suggestion, especially if more broadly construed, can be reconciled with the earlier opinions of this court, already cited, upon writs of error to the Circuit Court of the United States in admiralty cases, or in cases tried according to the law of Louisiana, need not now be considered.

In *Martin* v. *Marks*, (1877) upon a writ of error to the Supreme Court of Louisiana in an action in the nature of ejectment, Mr. Justice Miller, speaking for this court, said that the question whether a selection of swamp lands had in fact been filed by the surveyor general of Louisiana in the general land office was "not of that federal character which authorizes us to review the decision of the Supreme Court of Louisiana upon it." 97 U. S. 345, 348.

In *Kenney* v. *Effinger*, (1885) this court dismissed a writ of error to the Supreme Court of appeals of the state of Virginia for reasons stated in the opinion delivered by Mr. Justice Field, as follows: "The writ of error brought by the trustee raises

no federal question which we can consider. Whether the bond of Effinger was or was not executed with reference to Confederate notes is a question of fact for the state court, and not one of law for this court." 115 U. S. 577, 6 Sup. Ct.185.

In *Quimby* v. *Boyd*, (1888), in which various errors were assigned in a judgment of the Supreme Court of the state of Colorado between two adverse claimants of a lode, this court speaking by the present chief justice, dismissed the writ of error for want of jurisdiction, because some of the objections made in this court had not been taken below, and "the other alleged errors involved questions either of fact or of state and not of federal law." 128 U. S. 488, 489, 9 Sup. Ct. 147.

In *California Powder Works* v. *Davis*, *supra*, in which each party to a suit to quiet title claimed under a patent from the United States confirming a Mexican grant, and the judgment of the Supreme Court of California rested on the proposition of fact that the grant under which the plaintiff in error deraigned title was simulated and fraudulent, this court dismissed the writ of error for want of jurisdiction.

The case now before us is an action of ejectment, which was submitted to the Supreme Court of the same state, according to the local practice, upon findings of fact and a statement of evidence by an inferior court of the state. From the foregoing reasons and authorities it follows that this court cannot review the decision of the state court upon the question of fact whether the ledge, at the time when the town-site patent took effect, was known to be valuable for mining purposes; and, the only question of federal law in this case having been rightly decided by that court, its judgment is

Affirmed.

Mr. Justice HARLAN concurred in the judgment of affirmance, but not in all the reasoning of the opinion.

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ABANDONMENT.

1. *Quitting all work is abandonment.*—An oil lease contained a grant of a right to mine for and remove oil for a fixed period of twenty years, at a royalty of one-eighth of the oil so mined and removed. *Held*, that the right of the lessee was to explore for, and determine the existence of oil under the land, and if none was found, his right ceased when the explorations were finished and the lot abandoned. *Venture Co.* v. *Fretts*, 543

ACCOUNT.

1. *Measure of accounting for "what is justly and equitably due."*—Where an adventuring co-tenant of a slate quarry works the same on his own account the share due the idle co-tenant is the value of the idle co-tenant's share of the slate in place, under a statute allowing him "what is justly and equitably due." *Fulmer's App.*, 246

2. *Such a value is to be ascertained*, not by finding a proportionate share of the profits as if the parties had been partners but by the value of royalty customarily paid by lessees on such quarries. *Id.*

3. *Hostile title involved.*—Equity will not entertain a bill for an account against an alleged co-tenant who has been removing ores from the premises when he claims under a hostile title and denies the plaintiff's ownership. *Tecumseh Co.* v. *Camp*, 388

4. *A court of equity has no jurisdiction* to try a title at law, and it will not treat the account as an incident when it has no jurisdiction over the principal thing. *Id.*

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1. *Admission implied from notice.*—A notice, given by the defendants to the plaintiffs before the action was commenced, to

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repair the level in compliance with the original agreement, is an admission that the plaintiffs are the successors of C., M. & Co., in the title. *Crawford* v. *Witherbee*, 348

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ADVERSE CLAIM.

1. *The allegation that plaintiffs filed their adverse* in the land office not being denied by the answer becomes a fact admitted by the pleadings. *Burke* v. *McDonald*, 325

2. *But the citizenship of the adverse claimant* is an averment to be affirmatively proved, whether denied or not. *Id.*

3. *The verdict* in suit supporting adverse claim must be specific, that the party is not only entitled to the possession, but that he is so entitled by compliance with the law. This is essential to comply with the provisions for the instance where neither party may have complied with the mineral law. *Id.*

4. *An adverse claim filed on the 62d day* of publication is too late. *Hunt* v. *Eureka Gulch Co.*, 340

5. *Suit supporting same.*—When suit is brought purporting to support an adverse claim and it appears that the adverse claim was not filed within the sixty days allowed by law for filing the same, the suit is rightfully dismissed by the court at plaintiff's costs. *Id.*

6. *And it cannot be maintained under Section 257* of the Code, providing for the disposition of cases where plaintiff had title when suit was brought which has expired before judgment. *Id.*

7. *Although it takes 10 insertions* in a weekly paper to complete a sixty days publication, the notice thus appearing during a period of 64 days, the period of publication expires with the 60th day. *Id.*

8. *No jurisdiction to review land office ruling.*—In an action brought upon an adverse claim the trial court has no jurisdiction to review the action of the officers of the land department in holding that a plat and adverse claim conformed to their rules. *Hoffman* v. *Beecher*, 503

9. *No reference in complaint to the adverse.*—In an action upon an adverse claim it is not necessary that it be alleged in the complaint that the action was brought in respect to the property mentioned in the adverse claim. *Id.*

10. *Where the lengths of the side and end lines* of plaintiff's claim are reduced in the description given in the complaint from that given in the adverse claim the variance is immaterial where it appears that the defendant's claim, which is also described in the complaint, is wholly within the boundaries of plaintiff's claim. *Id.*

ADVERSE CLAIM. *Continued.*

11. *No survey by adverse claimants.*—Where an adverse claim had no accompanying plat from actual survey, the want of it being explained by physical impossibility of making survey on high ground on account of snow, but the nature, boundaries and extent of the conflict being shown as nearly as was practicable, the court will entertain the action brought in support of such adverse claim, even if they had the power to discard the action of the land office in sustaining it. *Id.*

12. *Averments as to being within statutory periods.*—The complaint supporting an adverse claim should show that the claim was filed within the sixty days of publication and the suit brought within the thirty days prescribed. *Cronin* v. *Bear Creek Co.*, 548

13. *Description in complaint.*—It must also contain such a description of the property as will enable the court to determine to what extent, if at all, the claim of the plaintiff is covered by the claim of the defendant, upon which patent is applied for. *Id.*

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1. *Notice, proof of claim of title.*—Adverse possession to ripen into title must be based on claim of title hostile to another title—and to prove such hostile assertion of title a location notice asserting it is admissible evidence. *Jones* v. *Prospect Mtn. Co.*, 530

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1. *Principal must answer for agent's fraud.*—The principal cannot take the benefit of a contract obtained by his agent through his agent's false representations and at the same time deny himself responsible for the making of such allegations. *Barnard* v. *Roane Co.*, 94

2. *Right to instruction on agent's power to locate.*—Where the complaint declared for the claim as one located by an agent, and the answer admitted that the claim if valid was one so made by an agent, the right of an agent to locate became a material point on the pleadings, and the plaintiff was entitled to an instruction

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ANNUAL LABOR.

1. *Review of the cases* on the point of resumption of work. *Honaker* v. *Martin*, 404

2. *Where the miner claims the statutory privilege* of resuming work after neglect but before relocation by another he must prosecute the same with reasonable diligence and complete the full requirement. *Id.*

3. *Facts held no resumption.*—Plaintiff paid the full sum of $100, to a party who claimed to have worked from Dec. 22, 1889, to January 12, 1890; carried $63 worth of logs and lumber to, but which were never used on, the claim, and testified that he did $50 worth of work in January but could show no material amount of sinking or other indication of labor to satisfy such valuation: *Held*, that there was no bona fide resumption. *Id.*

4. *No annual labor after entry.*—When the price of a mining claim has been paid to the government, the equitable rights of the purchaser are complete, and there is no obligation on his part to do further annual work in order to obtain a patent. *Benson Co.* v. *Alta Co.*, 488

5. *In annual labor case burden of proof shifts, when.*—The burden of proving a forfeiture is always upon the party relying upon the same. This is discharged prima facie by showing that no work during the year had been done upon the lode or upon the surface boundaries thereof. *Hall* v. *Kearny*, 594

6. *Utility of work done outside claim must be shown.*—When it appears that the work, claimed to be the annual assessment, had not been done within the surface boundaries of the location, but upon other property, it is incumbent upon the party so contending to show that such work was in fact intended as the annual assessment upon the claim and was of such a character as that it would inure to the benefit thereof. *Id.*

7. *Work done on adjoining patented ground.*—Work which is in fact done for the development of a mining claim may properly be considered as assessment work for such location, notwithstanding the fact that it was performed outside of the exterior lines of such property. And it is immaterial whether the improvement is upon patented or unpatented property. *Id.*

8. *Annual labor—Work outside the claim.*—The mining laws of the United States require that not less than $100 worth of labor shall be performed or improvements made during each year upon every unpatented location. Labor and improvements, within the

ANNUAL LABOR. *Continued.*

meaning of the statute, are deemed to be done upon the location when the labor is performed or improvements made for the express purpose of working, prospecting, or developing the ground embraced in the location. Work done outside of the limits of a mining claim, for the purpose of prospecting or developing it, is as available for holding the claim as if done within the boundaries of the location of the claim. *Book* v. *Justice Co.*, 618

9. *Work by tunnel to cut the group.*—The running of a tunnel for the purpose of prospecting, developing, and working of two separate and distinct mining claims owned by the same person is to be credited to both of said claims, and, if the necessary amount of work is done, it is deemed a sufficient compliance with the law; and the owner is not in such a case, required to also perform work on the surface of the locations, in order to hold the same. *Id.*

10. *Failure to file affidavit of labor.*—In construing the act requiring owners of mining claims to make affidavits as to the amount of work done, and to have the same recorded, (St. Nev. 1887, p. 136), *Held*, that the object of the act was to prescribe a definite way in which the proof of the performance of the work might be obtained, that the act was not intended to prevent the owner from making the proof in any other way, that it simply makes the record prima facie evidence of the facts therein stated, that a failure to comply with the terms of the act does not work a forfeiture, and that a forfeiture of a mining claim can only be established by clear and convincing proof of the failure of the owner to comply with the provisions of the law as to the amount of work required to be done. *Id.*

11. *Locations in names of individuals for benefit of corporation—Work done by corporation before obtaining legal title inures to the benefit of the locations.*—Defendant is a California corporation engaged in mining in the State of Nevada, and on the 2d day of January, 1888, was the owner of the Justice claim—a patented location. The locators of the West Justice and James G. Blaine locations, on that day, while in the employ of the corporation made the locations in their own names at the expense of, and for the benefit of, the corporation. The Justice, West Justice, and James G. Blaine are contiguous to each other. The corporation annually performed work by running tunnels from the Justice claim for the purpose of prospecting and developing the mining ground embraced within the locations of the West Justice and James G. Blaine. (See opinion as to the facts.) The locators of these claims did not convey the title to the corporation until the 29th day of November, 1892. *Held*, that the locations made for the benefit of the corporation were valid; that the work performed by the corporation in running the tunnels should be credited as work done upon the West Justice and James G. Blaine; and that

ANNUAL LABOR. *Continued.*

the work so done and performed, being sufficient in value, constituted a compliance with the mining laws. *Id.*

12. *Entitled to the whole year.*—Mining claimants are entitled to the whole of each calendar year to do the annual work and adverse claimants cannot lawfully enter and locate before the expiration of the year, where the work had been done for the previous year. *Mills* v. *Fletcher*, 671

13. *Not required after ouster.*—After an adverse entry by strangers who maintain possession of the only available opening on the mine such strangers cannot complain that the annual labor was not done by the parties ousted by them. *Id.*

14. *Present co-owner.*—The right to acquire by forfeiture, under Rev. St. § 2324, the part interest of one who fails to pay his proportion of the expenditure for annual labor, exists only in favor of one who is a co-owner in the year for which such labor is performed. *Turner* v. *Sawyer*, 683

15. *Appeal from judgment that neither party is owner.*—When in an adverse claim suit the finding is that neither party is entitled to possession, from which decision one party appeals and the judgment is reversed, the whole case is reopened and the judgment is not *res adjudicata* to either party. *Mattingly* v. *Lewisohn*, 693

16. *Jury verdict as to non-performance.*—The appellate court will not reverse a finding on the question of labor performed where there is evidence sufficient to uphold such finding. *Id.*

17. *Annual labor* need not be proved in an adverse case when it is not made an issue by the pleadings. The plaintiff in this case had denied performance by the defendant, but defendant made no issue of non-performance by plaintiff. *Id.*

18. *Misrecital of amounts in charge of court.*—The court in structed the jury that $75 of the annual labor was not in dispute, but as to the remaining $25, there was contention. In fact $78.50 of the total $100 was conceded: *Held*, immaterial error. *Id.*

19. *Form of instruction as to annual labor.*—An instruction which literally states the requirements of the law, is not too rigid in requiring proof of the full performance of the minimum amount fixed by the statute. *Id.*

20. *The test of the valuation of the annual labor* is what it was reasonably worth, not what was paid for it, nor the contract price. *Id.*

See ESTOPPEL, 3; RELOCATION.

APEX.

1. *Burden of proof on apex claimant.*—One holding a patent of the United States for a mining claim is entitled to challenge the right of any intruder within the lines of his claim, and to require

APEX. *Continued.*

him to justify such intrusion by proof of his proprietorship of a vein having its top or apex in another claim, the pursuit of which in its downward course has brought him within the lines of the claim in controversy. *Duggan* v. *Davey*, 59

2. *The law of the apex is purely statutory* and gives to the apex claimant a right unknown to the common law. *Id.*

3. *The presumption of ownership* is that the locator or patentee holds everything within his vertical lines until a preponderance of evidence shows an exterior apex under conditions allowing it to invade the ground between such vertical lines. *Id.*

4. *An outcrop of a vein on a hill side dipping at an angle of 8 degrees* is an "exposure of the edge of the vein on the line of its dip" and is not an apex as intended by the mining act such as to allow the owner of a claim located on such outcrop to follow the vein on its dip. *Id.*

5. *Where there are surface outcroppings from the same vein* within the boundaries of two claims, the one first located necessarily carries the right to work the vein. *Argentine Co.* v. *Terrible Co.*, 109

6. *When a mining claim crosses the course of the lode* or vein instead of being "along the vein or lode," the end lines are those which measure the width of the claim as it crosses the lode; and thus the lines which separate the locations of the parties in this case are end lines across which, as they are extended downward vertically, the defendant cannot follow a vein, even if the apex or outcropping is within its surface boundaries. *Id.*

7. *An earlier location though its survey lies across* instead of with the strike will hold all the vein within its lines against a later location on the same vein. *Id.*

8. *Apex running through group of claims.*—In a suit for trespass, defendants cannot, after suit brought, unite several claims, each having a portion of the outcrop, for the purpose of asserting the right to follow a vein upon its dip, when said right does not exist within the said claims, considered separately. *Cheesman* v. *Shreeve*, 260

9. *No extralateral rights to blanket vein.*—Defendant owned a claim from which it had worked to the west beyond its side line into plaintiff's claims whose end lines were practically the same as defendant's west side line. The weight of evidence seemed to be that the strike of defendant's vein was at right angles to its side lines: Also that the claim contained a substantially flat or blanket vein which had no apex. *Held*, that on such showing defendant should be enjoined from working beyond its west side line. *Gilpin* v. *Sierra Nev. Co.*, 310

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11. *A discovery disclosing, and the lines of the claim including,* any part of the width or apex of the vein is sufficient upon the point of legal disclosure of the vein within the limits of the claim. *Id.*

12. *Patent does not convey lodes apexing outside.*—A patent from the United States for mining ground does not convey to the patentee the veins or ledges which apex outside the boundary lines of the mine, extended downward vertically, and the mine owner is not necessarily the owner of such veins. *Jones* v. *Prospect Mtn. Co.*, 530

13. *Presumption—Burden of proof on apex claimant.*—The presumption, in the first instance, is that the owner of a mine owns all the veins found within his boundary lines, but, when there is evidence tending to prove that the vein in controversy apexes outside those lines, this, if sufficient, will rebut that presumption; and as the burden of proving ownership is, when denied, always upon the party alleging it, he must also meet and overcome this evidence, or he will fail in establishing his title. *Id.*

14. *Lode leaving side lines.*—Where the side lines of a claim, instead of the end lines, cross the course of the lode, the side lines will be treated as end lines, in order to define the locator's right to pursue the lode on its dip. *Watervale Co.* v. *Leach*, 568

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APPEAL.

1. *Where the case was tried below as an equitable action* it will be reviewed as such in the appellate court, which implies a trial *de novo*. *Fritzler* v. *Robinson*, 105

2. *A point decided on first appeal* becomes the law of the case without need of re-affirmance. *Schultz* v. *Keeler*, 198

3. *Interest added to make jurisdictional amount.*—When the judgment in the supreme court of a territory exceeds $5,000, this court has jurisdiction of an appeal, although the judgment in the trial court may have been for a less sum and the jurisdictional amount is reached in the appellate court by adding interest to that judgment. *Benson Co.* v. *Alta Co.*, 488

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1. *Working to boundary.*—Each party has a right to mine on its own side to the boundary. *National Co.* v. *Minnesota Co.*, 44

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2. *Breaking through into the adjoining mine* is not necessarily a trespass unless the party in breaking has crossed beyond his line. *Id.*

3. *A trespassing party is not bound to close a hole* made by him into the adjoining mine, but is responsible for the resulting damages. *Id.*

BOUNDARIES.

1. *Adopting gangway to be run, as division line.*—By written agreement defendants had the right to run a gangway over plaintiff's land, and were entitled to all the coal on the northwest side of it. The route of the gangway was not definitely laid down, but was to be ascertained by survey after it was commenced. Defendants did run a gangway, and removed coal from the southern side of it, claiming a right under the agreement to run a gangway in such a direction as would entitle them to the coal so removed. *Held*, that the gangway actually constructed fixed the boundary of defendants' coal and that they had no right to any coal south of the south end of such gangway and of a line drawn at right angles to its general direction. *Ashman* v. *Wigton*, 117

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CONFUSION—See MEASURE OF DAMAGES, 2.

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1. *Inadequacy of price so gross as to shock the conscience* may furnish sufficient ground for vacating, through equity, a conveyance executed or executory. *Barnard* v. *Roane Co.*, 94

2. *Inadequacy of consideration depends on the value of the land at the time of the purchase* and not at the time of the suit. *Id.*

3. *Failure to place improvements, not made condition subsequent.*—Where a deed conveying an undivided interest in land is executed in consideration of the grantees' oral promises to make certain improvements on the land, and do certain other acts in the future, and their performance is not made a condition subsequent, a mere failure to perform on the part of the grantees does not constitute a failure of consideration so as to entitle the grantor to rescind under Civil Code Cal. § 1689. *Lawrence* v. *Gayetty*, 169

4. *Mining prospect good consideration for stock deal.*—The defendant, being the owner of a silver mine in Arizona, prospected the same to the extent of driving a tunnel for a short distance,

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and sinking a shaft to about twenty feet, resulting in a find of a small vein of silver ore. He thereupon organized a stock company, in Iowa to operate said mine, with a capital stock of five hundred thousand dollars. In consideration of seventy thousand dollars' worth of such stock the plaintiff agreed to pay defendant seventeen hundred and fifty dollars, or convey to him certain real estate. *Held*, that the contract was not without consideration, nor was the consideration so inadequate as to constitute a badge of fraud. *Coles* v. *Kennedy*, 357

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CONTRACT.

1. *Written control printed words.*—Where a contract is partly printed and partly written, the written words are entitled to have greater effect given them in the interpretation of the contract, than those which are printed, for the written words are the terms selected by the parties themselves, to express their meaning in the particular case. *Duffield* v. *Hue*, 254

2. *Reversing decision after contract made on the faith of it.*—The law, as declared by a decision of the supreme court, when such decision is not a construction of a statute, does not enter into contracts made thereafter, and the subsequent reversal of the decision does not therefore impair the obligation of contracts in contravention of Const. U. S. Art. 1, § 10. *Ray* v. *West. Penn. Co.*, 374

3. *Strangers cannot question terms of contract.*—Whether a contract for the exclusive right to bore and maintain gas wells on a tract of land is a license or a lease, or executory or executed, or whether it is a fair one between the parties, cannot be brought into question by a trespasser and stranger to the contract, in an action by the grantee to enjoin him from boring wells. *Indianapolis Co.* v. *Kibbey*, 677

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1. *Construction of deed as to description* holding a certain parcel known as "Greys," as not conveyed, although leaving out its area left the recited acreage that much short. *Hext* v. *Gill*, 1

2. *There is no substantial difference between a title by exception out of a grant*, and a title by direct grant of the same subject. Under an exemption from a conveyance of land of all the coal therein, the dominion of the grantor over the coal is no greater, and his ownership is no more absolute, than if his title were acquired by purchase from one owning both coal and surface. *Lillibridge* v. *Lackawanna Co*, 412

CONVEYANCE. *Continued.*

3. *Deed gives apex rights.*—A deed of mining ground conveys whatever right its locator would be entitled to if he obtained patent from the United States, including the right to follow the vein on its dip into adjoining ground. *Stinchfield v. Gillis*, 497

4. *No reserve of cross-vein.*—A deed of mining ground conveys all veins apexing within such ground and the grantor cannot follow a vein from outside ground into the ground conveyed claiming the same as a cross-vein. *Id.*

5. *Grant of one ore—Reserve of another.*—Review of previous construction of deeds between the litigants and their privies in which one sort of ore was reserved and another granted. *Lehigh Co.* v. *New Jersey Co.*, 600

6. *Ore without commercial value at date of deed.*—Where certain ore, at the time of making certain deeds containing grants of one sort of ores and reserve of another sort found in the same mine, had no commercial value, which value it afterwards acquired, such deeds are to be construed as referring to the conditions and value of such ore at the date of the delivery of the deeds. *Id.*

See DESCRIPTION, END LINES, LICENSE, 3; MINERALS, RESERVATION, SEVERANCE, WAY, 2, 3.

CORPORATIONS.

1. *Action by the company against its promoters.*—Corporation may maintain an action against its promoters to recover profits realized by them from the sale of property to the corporation at a sum which they represented to be the cost price, but which was in fact in excess of such price. *Pittsburg Co.* v. *Spooner*, 226

2. *Illegality, when no defense.*—Agents receiving moneys upon illegal sale of stock of a corporation cannot set up the illegality of the transaction as a defense to an action by the corporation to compel them to account therefor. *Id.*

3. *Promoters and organizers estopped.*—Persons who have been instrumental in the formation of a corporation and in issuing alleged stock, and who have contracted with the corporation with full knowledge of all its transactions, are not in a position to contest the regularity of its formation. *Id.*

See ANNUAL LABOR, 11; CONSIDERATION, 4; ESTOPPEL, 5; FRAUD, 7, 8.

COVENANT.

1. *Perpetual covenant—Reward for drainage.*—By a contract under seal C., M. & Co. agreed to excavate or run a "level" to drain certain mineral lands, and, in consideration thereof, W., the owner agreed to render to them one-eighth of all the mineral

COVENANT. *Continued.*

raised on said lands. It was expressly stipulated that the contract should be binding upon the heirs, executors, administrators, and assigns of both parties, and that the covenant of W. should run with the land; and, to secure to C., M. & Co. one-eighth of the mineral raised, an undivided eighth of all the mineral in the lands was conveyed to them. *Held*, that the covenant of W. ran with the land. *Crawford* v. *Witherbee*, 348

2. *Question as to party to repair tunnel not raised.*—The contract was silent as to the depth to which the level should be excavated, and as to who should keep it in repair. In an action by the successors in title of C., M. & Co. against devisees of W. to recover the value of one eighth of the ore raised on the lands during a certain time, it appeared that though the level was somewhat out of repair, yet the ore was got without trouble or increased expense by reason of water. *Held*, that the question whether or to what extent the plaintiffs were bound to keep the level in repair, was not raised. *Id.*

CROSS LODE.

1. *The ore within the space of intersection* means that body of ore bounded by the two walls of the one lode and the two walls of the intersecting lode. *Watervale Co.* v. *Leach*, 568

2. *Such ore belongs to the prior locator*, a right of way through it to the junior locator. *Id.*

3. *The crossing of lodes* does not mean the crossing of the two locations or surveys. *Id.*

4. *Details of the interference of crossing.*—The Black Eagle was the prior location. Later the Little Comet was surveyed across it at right angles and a lode was followed by drift from the Little Comet end line to the center of the Black Eagle survey apparently tending to cross the entire width of the Black Eagle. *Held*, that the ore in the Little Comet vein within the Black Eagle lines belonged to the Black Eagle claim. *Id.*

5. *Priority of rights—No question as to cross-veins.*—The West Justice and Blaine locations being prior in point of time, and the locators and owner thereof having complied with the mining laws, it necessarily follows that the location of the Peerless within the limits of said locations is entirely null and void, and no question as to its being a cross-vein can be considered. *Book* v. *Justice Co.*, 620

6. *Cross lode no right to surface.*—The position of the junior locator in such case is not aided by the fact that his location rests upon the discovery of a vein which crosses the vein of the senior location; for, while he may be entitled to work his vein into the senior location and up to the point of crossing, this does not affect

CROSS LODE. *Continued.*

the senior locator's right to the possession of the entire surface of his claim. *Oscamp v. Crystal R. Co.*, 651

See CONVEYANCE, 4; LOCATION, 8; LODE, 13; VERDICT, 4.

DAM, See FLOODING.

DELIVERY.

1. *Delivery complete on loading.*—Where under an executory contract for all the ore of a certain mine, made in good faith, a lot of ore placed on wagons and started for the mill of the ore buyer, the delivery is complete from the time of loading and an attaching creditor takes nothing by his levy. *West* v. *Humphrey*, 367

2. *The freighter is buyers' agent.*—In such cases the carrier is the agent and bailee of the consignee and not of the shipper. *Id.*

See ORE, 2, 4; SALE.

DESCRIPTION.

1. *A variance in the description* of the premises, as contained in the complaint and adverse claim, which consists in giving the general course of the last line of plaintiff's claim as southwest in the adverse claim, when it should have been southeast as given in the complaint, is harmless, where the place of beginning is designated as the terminus of such last line. *Hoffman* v. *Beecher*, 503

See ADVERSE CLAIM, 10, 13; BOUNDARIES, CONVEYANCE, 1; EJECTMENT, LOCATION CERTIFICATE, MISTAKE, 1; PLACERS, 2.

DISCOVERY.

1. *Float ore no discovery of lode.*—The fact that three tons of silver-bearing rock, yielding $600, have been extracted from a mining claim, does not entitle the locator to enter the claim for a patent when no vein or lode has been discovered within the limits of the claim, the location having been made merely in the hope of finding such at some future time. *Waterloo Co.* v. *Doe*, 586

2. *Discovery of lode—What constitutes.*—Any discovery of quartz or other rock in place, bearing gold, silver, or any of the precious metals or valuable deposits specified in the first clause of section 2320, Rev. St. U. S., constitutes a "discovery of a vein or lode," within the meaning of those words as used in the last clause of said section, which declares that "no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located." *Book* v. *Justice Co.*, 619

DISCOVERY. *Continued.*

3. *Discovery in rock in place—Value of mineral not material.*—The statute was intended to apply to any kind of a vein or lode of quartz or other rock in place, bearing mineral, in whatever kind, character or formation the mineral might be found. The statutes should be so construed as to protect locators of mining claims who have discovered rock in place, bearing any of the precious metals named therein in sufficient quantity to induce them to expend their time and money in prospecting and developing the ground located. When the locator finds the rock in place, containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants a location of a mining claim to be made. *Id.*

4. *Fact of previous discovery.*—It is not necessary that the locator of a mining claim should be the first discoverer of a vein or lode, in order to make a valid location. It is sufficient if it be clearly shown that the locator knew at the time of making his location that there had been a discovery of a vein or lode within the limits of his location. *Id.*

See APEX, LOCATION, LOCATION CERTIFICATE, LODE.

DISCOVERY SHAFT.

1. *Discovery shaft must show mineral or well-defined crevice.*—It is requisite to a valid location and to the ownership of the title to a valid lode mining claim, that there should be a discovery of ore, gold or silver bearing mineral in rock in place, showing a well-defined crevice, a discovery shaft at least ten feet deep from the lowest rim thereof, which discovery of mineral must be at the point claimed and designated, or made the point of discovery by the locators of said claim, and so designated in the location certificate relied upon by them in the making of said location. *Cheesman* v. *Shreeve*, 260

DISTRICT RULES.

1. *District rules determinable in land office.*—The question under Rev. St. § 2319, as to what customs and rules of miners in a mining district not inconsistent with the laws of the United States are in force in the district when an application is made for a patent on mineral land, is one of fact determinable by the commissioner of the land office. *Parleys Park Co.* v. *Kerr*, 201

2. *District rule adopting terms of statute.*—Rule 4 of the rules of the Blue Ledge mining district in Utah, adopted May 17, 1870, limiting the width of a mining location to 200 feet, was so modi-

DISTRICT RULES. *Continued.*

filed May 4, 1872, that thereafter the surface width was to be governed by the laws of the United States. *Id.*

DITCH, See WATER.

DRAINAGE.

1. *No implied contract to pay for.*—Assumpsit cannot be maintained by the owner of a lime quarry against the owner of another quarry adjacent, but not adjoining, to recover compensation for pumping out water that accumulated in the latter, and ran through the intervening quarry into the former, no express promise of payment therefor being proved. *Ulmer* v. *Farnsworth*, 134

2. *Usage, local and recent.*—Nor can the plaintiff recover upon an implied promise on the ground of usage or custom, when it appears that the alleged custom is local, recent in origin, and not uniform. *Id.*

See COVENANT, 1.

EJECTMENT.

1. *In ejectment between possessory claims* each party must rely on the strength of his own title; defects in the paper title of the party in possession are not material until the other party proves a valid location. *Strepey* v. *Stark*, 28

2. *Action on the case—Defendant not withholding possession.*—The owner of land covered by water or the owner of the mineral interest may maintain such action but case for damage is the remedy where the defendant has done an injury to the land but is not in possession. *Ezzard* v. *Findley Co.*, 40

3. *Sufficient description of tunnel site.*—In an action to recover a mining claim, the complaint, after setting forth the location by plaintiff's grantors of a tunnel and tunnel site in Snake River mining district, Summit county, Colo., at the base of the Glacier mountain, stated that said grantors caused to be made out and recorded a location certificate of said tunnel claim, describing the location and boundaries thereof; that the said tunnel claim was, by its locators, named the "Silver Gate Tunnel Claim,' and is described more fully as follows: "Commencing at the base of said Glacier mountain east of Bear creek, and running southeast and parallel with Coley tunnel, through said mountain, 5,000 feet from the mouth or starting point of said tunnel, at a stake marked and in or at the mouth of said Silver Gate tunnel, and 250 feet northeast, and 250 feet southwest, from said stake or tunnel, to its termination." *Held*, on demurrer, that the description was sufficient. *Gl[illegible] Mtn. Co.* v. *Willis*,

EJECTMENT. *Continued.*

4. *Lodes not separately described.*—Although the lodes alleged to be embraced within the tunnel-site location are not each separately described, the statement in the complaint, that all the lodes in the tunnel claim have been worked and mined by plaintiff and its grantors, comprehends every part of the property for the recovery of which the action is brought. *Id.*

5. *Sufficient denial of plaintiff's ownership.*—Where the complaint alleges that the plaintiffs are the owners and in possession of a mine, an answer which denies that they are the owners or in possession of a certain part of the mine, describing it, does not admit plaintiffs' ownership of that part. Nor do the facts that the answer also alleges that the defendant is the owner of that part of the mine, and that a certain ledge therein found apexes outside the plaintiff's boundary lines, constitute such an admission. *Jones* v. *Prospect Mtn. Co.*, 530

6. *Partial recovery in ejectment.*—In an ejectment suit plaintiff is not ordinarily limited in his recovery to the precise amount specified in his declaration, but may recover a less quantity. *Oscamp* v. *Crystal R. Co.*, 651

7. *No cross complaint needed in ejectment.*—In ejectment defendant has no occasion to file a cross complaint to quiet title, nor should his title be pleaded except as a defense. *Mills* v. *Fletcher*, 671

8. *Ejectment does not lie.*—One who has acquired a tract of land for the purpose and with the exclusive right to bore and maintain gas wells thereon under a contract by which the owner covenants not to allow wells to be bored on an adjoining tract, could not maintain ejectment against one entering on the adjoining tract, and threatening to bore wells, since, as to that tract, he only has the right to the gas under the surface. *Indianapolis Co.* v. *Kibbey*, 677

See ADVERSE CLAIM, FLOODING, 1.

END LINES.

1. *End lines must cross the outcrop.*—End lines designated in the location certificate are not necessarily, in law, the end lines, unless they actually cross the actual outcrop of the vein. *Cheesman* v. *Shreeve*, 261

2. *The law intended that end lines* should be laid at substantially right angles to the strike of the vein. *Duggan* v. *Davey*, 59

See ADVERSE CLAIM, 10; LOCATION, 5.

EQUITY.

1. *Facts of the case.—Complainant seeking equity must do equity.*—The vendor of 50 feet on a lode claim brought suit to

EQUITY. *Continued.*

compel completion of the purchase. He got judgment for the agreed price and was to deposit deed to the defendants. He found nothing clear on which to levy. He brought suit to set aside a certain trust deed in favor of his judgment. In the meantime on failure by either side to represent the ground he caused it to be jumped for his benefit. *Held*, that such action destroyed his status in a court of equity. *Drake* v. *Gilpin County Co.*, 396

2. *One seeking to destroy the very title he has contracted to convey* will not be assisted by a court of equity to collect the purchase money therefor out of other property of the grantee by subordinating the valid claims of third parties to the payment of such purchase-money. *Id.*

See ACCOUNT, 3-5; EXHAUSTED MINE, 1; MISTAKE, QUIET TITLE.

ESTOPPEL.

1. *No estoppel between buyers at different judicial sales.*—A defendant in ejectment, who is in possession as a purchaser at a judicial sale of the land subject to the lien of a mortgage, is not estopped from defending his title against a purchaser at a subsequent judicial sale for the mortgage debt. *National Co.* v. *Weston*, 143

2. *Vendor defeating his own title.*—One invested with possessory title to a mining claim, and who, in pursuance of a contract of sale thereof, executes and places in escrow a deed to the purchaser, with covenants of warranty against all adverse claims and incumbrances, except as against the United States, cannot lawfully himself acquire an adverse claim thereto, while seeking to enforce the collection of the purchase money, by judgment against the purchaser. *Drake* v. *Gilpin County Co.*, 396

3. *Neglect by vendee to do annual labor.*—The neglect of the grantee to comply with the mining laws of the government, by reason of which its possessory rights were liable to forfeiture, gave its grantor no right to enter and acquire an adverse title to the claim; such conduct being both a breach of faith with his grantee, and a violation of his covenants. *Id.*

4. *The grantor of a claim cannot by later location* of the ground obtain a title which he can assert against his grantee. *Stinchfield* v. *Gillis*, 497

5. *Cestui que trust consenting to form corporation.*—A claimant of an interest in a mining claim, of which the legal title is held by another under contract to convey to the claimant in a certain contingency, waives his right to a conveyance if he consents to the formation of a corporation to take and develop the property. *Johnston* v. *Standard Co.*, 554

6. *Estoppel by deed.*—The equitable title acquired by the vendee

ESTOPPEL. *Continued.*

of lands under a contract to convey cannot work an estoppel to the assertion of the legal title by a third person to whom the vendor has conveyed it. *St. Louis Co.* v. *Montana Co.*, 658

EVIDENCE.

1. *Recent admission by agent.*—The foreman in charge immediately, or within a very short period after the accident, stated that "in the morning he would have it fixed safe": *Held*, that this evidence was properly admitted as part of the *res gestae*. *N. Y. Co.* v. *Rogers*, 123

2. *Limitations to parol explanations.*—While parol evidence is admissible to ascertain the nature and peculiar qualities of the subject matter of a contract, and to show the situation of the parties with respect to it, yet, where there is no latent ambiguity involved, the construction of the contract is for the court. *Duffield* v. *Hue*, 253

3. *Objection as "immaterial" admits authentication.*—An objection to the admission of a will in evidence on the ground that it is immaterial and incompetent for any purpose, is not available to exclude it on the ground that it is not sufficiently authenticated or proved. *Crawford* v. *Witherbee*, 348

4. *Patent to excluded area.*—The offer in evidence of a patent (to show outstanding title) upon parcel of the mining premises not within the area of conflict, was a tender of irrelevant testimony. *Mills* v. *Fletcher*, 671

See ADMISSIONS, LOCATION CERTIFICATE, 1; USAGE, WORKINGS, 2.

EXHAUSTED MINE.

1. *Where both parties believe coal to exist* but none is found, equity will relieve on the ground of total failure of consideration arising from mutual mistake. *Fritzler* v. *Robinson*, 105

FAULT.

1. *Zinc range broken by fault—Held to be same vein beyond.*—Plaintiff was the owner in fee of premises in which was a range of mineral discovered and worked by defendants. Under an agreement defendants were limited to work the range to a certain point on the land. About half the distance had been worked when a solid wall of rock was struck against, at which the crevice they were following abruptly ended and the yield of ore stopped. Another shaft was sunk about 45 feet ahead, and in the general direction of the range. From this shaft a drift was made in the same general direction, and finally a crevice was struck in which mineral was again found. This was only a few rods from the

FAULT. *Continued.*

point where the crevice "pinched out." The crevice, before it reached the barrier, and after the barrier was passed, was of the same general character. There was no change in the rock, and the mineral found on both sides of the barrier was alike. *Held*, not a new discovery of ore so as to relieve defendants from the limitation prescribed in the original entry. *Raisbeck* v. *Anthony*, 148

FIXTURES.

1. *Removal of fixtures allowed after forfeiture.*—The lease provided that for failure to pay the stipulated royalty within 30 days after due, and to perform the conditions of the lease, the lessors might declare a forfeiture and take possession of the mine and all property connected therewith. It also provided that engines, buildings, etc., placed on the premises by the lessees, might be removed at the termination of the lease, "unless all right thereto had been forfeited by a forfeiture of this lease." *Held*, that a forfeiture declared for non-payment of the royalty did not deprive the lessee of the right to remove buildings and other personal property within a reasonable time. *Mickle* v. *Douglas*, 137

FLOODING.

1. *Ejectment does not lie for flooding lands by a dam. Ezzard* v. *Findley Co.*, 40

FORFEITURE.

1. *Waiver of forfeiture.*—The right of the lessor in an oil lease to insist upon a forfeiture by reason of a failure of the lessee to put down a seventh well in a stipulated time, is waived by his acquiescence in the failure to put down two or three of the preceding six wells within the periods stipulated in the lease. *Duffield* v. *Hue*, 254

2. *Lessee no right to assert forfeiture.*—An oil and gas-lease contained a stipulation that the lessee should complete a well within a certain time, or thereafter pay to the lessor certain sums, semi-annually, until such completion; and provided that the lessee's failure to complete said well, or to make such payments, as stipulated, should render the lease null and void and of no effect between the parties. The forfeiture clause being inserted in the interest of the lessor, he had the option, upon a default by the lessee, either to declare the forfeiture or to affirm the continuance of the contract; and when he adopted the latter alternative, the lessee could not set up a forfeiture as a defense to an action in affirmance of the lease. *Ray* v. *West. Penn. Co.*, 374

3. *Re-entry to declare forfeiture, when not necessary.*—When the lessor, being entitled so to do by the terms of such a lease,

FORFEITURE. *Continued.*

remains in possession of the land subject to the rights of the lessee, and the lessee has never taken any possession, a formal re-entry by the lessor, for condition broken, is not requisite to effect a forfeiture, and such occupancy after the breach is not an implied assertion of forfeiture. *Id.*

See FIXTURES, 1; LEASE, 8, 9; OIL, 2.

FRAUD.

1. *Misrepresentations are fraud per se.*—Misrepresentations of material facts or the projection of false impressions in order to mislead or obtain an undue advantage is a fraud in terms. *Barnard* v. *Roane Co.*, 94

2. *A promise made without intention to perform* is a fraud on which a contract may be rescinded. *Lawrence* v. *Gayetty*, 169

3. *Mere failure to perform* does not relate back so as to render the promise fraudulent. *Id.*

4. *Sufficient complaint averring fraudulent promise non-performed.*—In an action to set aside a deed, on the ground of fraud, allegations that defendants, the grantees, made certain promises, fully set out; that plaintiff relied upon, and had a right to rely upon, such promises and was induced thereby to and did make the conveyance; and that defendants have not performed the acts promised, and had no intention of doing so at the time they made the promises,—sufficiently set forth the material facts constituting such a fraud as under Civil Code Cal. § 1572, subd. 4, is ground for the rescission of a contract. *Id.*

5. *Concealing discovery of float ore.*—Plaintiff sold to defendant a lode claim on which he had developed a small vein; defendant bought not for the value of the discovered vein, but upon the hope of finding within the lines of the claim a better vein, float from which had been shown to him. Following up this float shortly after the purchase, he discovered the large and valuable vein from which it came: *Held*, that the knowledge of float was not knowledge of the vein, and that the allegations of fraud and concealment were wholly unsupported. *Synnott* v. *Shaughnessy*, 213

6. *Payment by vendees of a commission to vendor's agent*, held under the facts of the case, no fraud. *Id.*

7. *Imposition by promoters on stockholders.*—If promoters of a corporation have obtained an option for the purchase of property at a certain price, and have proceeded to form a corporation, representing to persons whom they induced to subscribe for its stock that such option would cost a larger price than they have agreed to pay, and if, after procuring such subscription, they purchase the property at the smaller price and charge the corporation the

FRAUD. *Continued.*

higher, it may sustain an action against them, and recover the difference between the two prices. *Pittsburg Co.* v. *Spooner*, 226

8. *Pretense that gratuity holder was a real buyer.*—The representation by a promoter of a corporation to one, as an inducement to his subscription to the capital stock in such corporation, that a person named, of wide reputation for his sagacity in business affairs, had agreed to subscribe for a large amount of the same stock, without disclosing the fact that said stock was given such persons as a gratuity for the use of his name, is such a fraud as will entitle one who has subscribed for stock upon the faith of such representation to have his contract of subscription cancelled in a court of equity. *Coles* v. *Kennedy*, 357

See AGENT, 1; CONSIDERATION, 1-4; RESCISSION.

INDIAN RESERVATION.

1. *Status of claim when reservation opened.*—Location of a mining claim upon the Ute Reservation was inoperative under the terms of the treaty. When the locators failed to file a relocation under the State Laws of Colorado within three months after the Reservation was thrown open they cannot hold against intervening locators making their location after the Reservation became public domain. *Kendall* v. *San Juan Co.*, 475

2. *Allowing statutory time to record.*—Mining locators within a reservation treated as discoverers having the statutory period to stake and record from date of opening to the public, treating that date as date of discovery. *Id.*

INJUNCTION.

1. *Threat to mine.*—Where a defendant is not taking the minerals but in his defense asserts his right to take them it is a threatening which will justify an injunction for their preservation. *Hext* v. *Gill*, 1

2. *Boring well through worked out coal seam—Anticipation of danger.*—Plaintiff owned the coal under a certain tract, a portion of which had been worked out. Defendant, the surface owner, or lessee of the surface owner, was about to drill an oil well through the worked out seam of coal. *Held*, that the danger was obvious for the escape of oil or gas through the open seam to those still mining for the ungotten coal. But that by proper precautions such danger could be averted and that the injunction be dissolved upon defendant's showing that such precautions had been taken. *Armstrong* v. *Auen*, 392

3. *The sufficiency of a complaint is not involved where a mere temporary injunction is asked*, but the court will grant relief

INJUNCTION. *Continued.*

where it appears that the case is a proper one for investigation. *People's Co.* v. *Tyner*, 481

4. *Pending suit to try title.*—In the federal courts an interlocutory injunction may be granted, restraining the mining of valuable ores pending an action at law to determine the legal title, when such title is in dispute. *Erhardt* v. *Boaro*, 5 Sup. Ct. Rep. 565; 113 U. S. 537, followed. *St. Louis Co.* v. *Montana Co.*, 658

5. *Contest between legal and equitable title.*—The legal title is not "in dispute," however, within the rule requiring the institution of an action at law, when complainant shows a conveyance from the government patentee, and defendants merely claim under a contract to convey, made by such patentee, which is merely an equitable title; and in such case the court may issue an interlocutory injunction pending the determination of the title by suit in equity. *Id.*

6. *Complaint must show point where trespass begins—Apex case.*—An injunction will not issue to restrain the removal of ores from disputed ground between mining claims, when neither the bill nor any affidavit or other evidence fixes the point where defendant must stop. The court will not in terms enjoin defendants from working any vein having its apex in complainant's claim, for this would require defendants to ascertain from what acts they are enjoined. *Id.*

7. *Prospecting not enjoined.*—The working of disputed mineral ground for purposes of exploration only, will not be enjoined. *Id.*

8. *Injunction is the proper remedy* against one who attempts or threatens to bore gas wells on land, to the flowage of gas under which plaintiff has by contract with the owner acquired the exclusive right, as the damages could not be measured. *Indianapolis Co.* v. *Kibbey*, 677

See NATURAL GAS, 5.

INSPECTION.

1. *The right to order an inspection* of the mining premises in controversy is within the powers of a court of equity without the aid of a statute. *Duggan* v. *Davey*, 59

2. *Right to order inspection before suit brought—The statute Constitutional.*—The Montana statute allowing the court upon proper proceedings to order the inspection of a mine is not in violation of the bill of rights against depriving one of property without due process of law. It is a means of securing the best evidence in a certain class of cases though it may be allowed under the statute before suit brought. Any order oppressive in its

INSPECTION. *Continued.*

nature if made can be corrected by review on certiorari. *St. Louis Co.* v. *Montana Co.*, 283

3. *The right to inspect was exercised under common law practice* and the court reviews the line of authorities under which orders of inspection have been made in the English and American courts. *Id.*

INSTROKE—See WAY, 4.

INSTRUCTIONS.

1. *The refusal of instructions* though sound in law becomes immaterial when the jury finds the facts upon which they were predicated against the party asking them. *Argentine Co.* v. *Terrible Co.*, 109

See ANNUAL LABOR, 18, 19.

INTEREST—See APPEAL, 3.

KNOWN LODE.

1. *Greater includes the less.*—On an issue as to whether a certain vein was excepted from the patent, it was harmless error to charge that it was excepted if known to exist at the date of the patent, when all the evidence offered with respect to the existence of such knowledge related to a time anterior to the application. *Iron S. Co.* v. *Mike & S. Co.*, 436

2. *What is proof of knowledge.*—The knowledge must be that of the applicant for the placer patent, but he is chargeable with knowledge of what is known generally in the community, or what would be disclosed by a reasonable and fair inspection of the premises for the purpose of obtaining title from the government; and an applicant must be held to know of the existence of a tunnel which runs 400 feet under the tract, and of certain veins which it intersects, and which are so distinctly marked as to be disclosed by a casual inspection. *Id.*

3. *Vein must have value—Value a jury question.*—A "vein or lode" of mineral deposit, within the meaning of the statute, must be clearly ascertained, and of such extent as to render the lands more valuable and justify their exploitation; but the question as to whether a given vein is of this character is one of fact for the jury, to be determined upon evidence of its dimensions, its general course and direction, its product of metal per ton, and the facility for reaching and working it. *Id.*

4. *Failure to record explainable.*—In determining whether a particular deposit disclosed by the running of a tunnel then be-

KNOWN LODE. *Continued.*

came a "known" vein, the fact that the persons running the tunnel did not then, or until about two years afterwards, and after the filing of an application for a placer patent, attempt to develop the vein, is not conclusive, when the evidence shows that they, as well as all other miners in the community, were at that time in search of a much richer deposit which was generally believed to underlie the territory. *Id.*

5. *Evidence corrected by instruction.*—The jury could not have been misled into finding for the vein claimants by the admission of evidence as to this general belief in the existence of a blanket vein, when the court in its charge clearly pointed out that the rights of the parties turned entirely on the known existence of the particular vein disclosed by the tunnel. *Id.*

See PLACERS, 4, 5; TOWN SITE.

LACHES.

1. *Facts of the case.*—Defendants in 1872 bought the mineral in a tract of land at $2.50 per acre. In 1883 plaintiffs retendered the purchase money and demanded reconveyance on the ground of fraud. The alleged representations were general—that a railroad would be built, etc., and inadequacy of consideration was alleged: *Held*, that even if a fraudulent intent in the purchaser were shown the long and unaccounted for delay was an absolute bar to relief. *Barnard* v. *Roane Co.*, 94

2. *The mere institution of a suit* does not, of itself, relieve a person from the charge of laches, and if he fail to prosecute it with diligence the consequences are the same as if it had never been instituted. *Johnston* v. *Standard Co.*, 554

3. *Plaintiff should make enquiry.*—Where laches is in issue the plaintiff is chargeable with such knowledge as he could have obtained upon inquiry when the facts were such as to put upon enquiry a person of ordinary intelligence. *Id.*

4. *Where the property is of fluctuating value* the duty to enquire is the more peremptory. *Id.*

5. *Facts of the case prove laches.*—In 1880 plaintiff conveyed a quarter interest in a mining claim, the vendee agreeing to bring suit to clear the title and reconvey a one-eighth interest. The vendee settled the title by a compromise and conveyed the property to a corporation of which facts plaintiff had notice or knowledge sufficient to put him on enquiry. In 1884 the claim was patented to the corporation or its successor, of which plaintiff obtained knowledge in February, 1885. In 1885 and 1886 plaintiff began suits, neither suit being diligently prosecuted and both of them dismissed. In 1887 the present suit was filed. In the mean-

LACHES. *Continued.*

time the property had increased in value from a few thousand to several million dollars, and the stock had come into the hands of persons ignorant of plaintiff's claim. *Held*, that plaintiff was guilty of laches barring the case. *Id.*

LAND OFFICE—See ADVERSE CLAIM, DISTRICT RULES.

LEASE.

1. *An oil lease is to be construed* with reference to the known character of the oil business and the evident intention of the parties. *McNish* v. *Stone.* 22

2. *A covenant to commence operations within 6 months* is not performed by commencing and then indefinitely suspending operations. *Id.*

3. *Sinking one well which is abandoned* as dry followed by suspension of all work or possession for 12 years is a surrender of the lease. *Id.*

4. *Implied reserve of surface support.*—A lease granted the right to mine "all the coal" under certain described premises, over which a railroad was operated, the lease to continue 15 years, unless "all the coal is sooner mined out." *Held*, that the lessees could mine only so much of the coal as could be removed without injury to the surface. *Mickle* v. *Douglas*, 137

5. *Agreed damages for delay based on a "per annum"—Construction of the period of delay.*—Lessees agreed to commence operations within sixty days and to complete one oil well within three months thereafter, in default of which they were to pay, within three months after the lapse of such period, at the rate of $1,000 per annum as damages for the delay: *Held*, that the lessees were liable for a delay of 60 days plus the first period of three months, making five months in all, or five-twelfths of $1,000. *Galey* v. *Kellerman*, 164

6. *Lease and sale distinguished.*—A grant of "the exclusive right and privilege of digging and boring for oil and other minerals," for the term of fifteen years from the date thereof, must be treated as a lease for the production of oil, and not as a sale of the oil or of an interest in the land. *Duffield* v. *Hue*, 253

7. *Destruction of first well.*—Whether, if first well destroyed, lessee must make a second not decided—but lessee cannot hold the premises and refuse to operate them. *McKnight* v. *Manufacturers Co.*, 429

8. *Lessees right where not bound by covenants, to elect to forfeit.*—One who takes an oil lease, conditioned to be void unless he shall do something in the way of development by putting down a well within a certain time, or unless he pays so much per month

LEASE. *Continued.*

in money, but without covenanting to do either, and who in fact does nothing in the way of development, and makes payments only for a short time, cannot be compelled to continue such payments, but may insist on forfeiting his rights. *Ray* v. *Gas Co.* 138 Pa. St. 576; 17 M. R. 374 distinguished. *Glasgow* v. *Chartiers Co.*, 523

9. *Clauses in a lease that default shall render it null and void*, or that it cannot be renewed without lessor's consent and that no right of action shall accrue for breach etc., do not extinguish the lease *ipso facto* but are for the lessors' protection and he, to determine the lease, must assert the forfeiture. *Leatherman* v. *Oliver*, 526

10. *Signed by one party only.*—The signing and acknowledgment by the party of the first part of a contract granting the exclusive right to bore and maintain gas wells on a tract of land, and its acceptance and recording by the party of the second part, make it a binding contract between the parties, though it is not signed by the party of the second part. *Indianapolis Co.* v. *Kibbey*, 677

See ABANDONMENT, FIXTURES, 1; FORFEITURE, NATURAL GAS, OIL.

LICENSE.

1. *Prospector's rights by statute.*—The Wisconsin statute, where land is explored by a prospector with consent of the owner, provides that he shall not be deprived of the profits of the find by any arbitrary action of the owner. *Raisbeck* v. *Anthony*, 148

2. *Insufficient evidence of unlimited license.*—The limitation on the right to work the range having been created by contract, the discoverers of the range and those claiming under them could be relieved therefrom only by contract; and the evidence (showing, among other things that the land-owner told one of the owners of the range to go where he pleased upon the range and work it as he pleased) is *held* insufficient to show that the limitation was ever abrogated. *Id.*

3. *Equitable ownership passes by executed contract though without seal.*—A contract not under seal, whereby, for a consideration, (afterwards paid) the owner of the land agrees to "grant the right and privilege of digging all the ore in his land," is an equitable conveyance of the ore in fee, and not a mere license to take minerals, and trespass by the grantee of the owner will not lie against those claiming under such contract for removing ore from the land. *Fairchild* v. *Dunbar Co.*, 242

LOCATION.

1. *There are four essentials to complete location.*—1, the ten foot shaft; 2, the posted notice; 3, the surface staking and 4, the record of the location certificate. *Strepey* v. *Stark*, 28

2. *Such location certificate is prima facie proof* of whatever the statute requires it to state but is not evidence of what is not required to set forth, e. g. the depth of the discovery shaft. *Id.*

3. *The relocation certificate relates back* and cures a void original certificate but will not in such case cut out an intervening valid location. *Id.*

4. *A location stake must be erected at the discovery* of said claim, with a plain sign or notice thereon, containing the name of the lode, the name of the locator, and the date of the discovery. *Cheesman* v. *Shreeve*, 260

5. *The claim must have its boundaries so marked upon the surface as to be easily traced* by means of six substantial stakes, one set at each corner of said claim, one at the center of each side line thereof; which stakes shall be of substantial character, and sunk in the ground, hewed on the two sides of the corner stakes which are in towards the claim, and the side stakes hewed on the side which is in towards the claim. *Id.*

6. *Parallelism of end lines immaterial—Right to rectify end lines.*—The Silver King was located in 1881 with diverging end lines, but an amended survey was made in 1882 making the end lines parallel followed later by an official survey and application for patent on the amended and proper lines of 1882. *Held:*

1. That the amended survey cured the original defect in the location.

2. That the statute requiring end lines to be parallel is directory merely.

3. That the question of diverging end lines could become material only when they diverge to any considerable extent and the vein is followed on the dip into territory beyond the length of its parallelogram within the extra area gained by the divergence.

4. That the owners had the right to follow their vein on its dip underneath an adjoining claim whether their end lines were parallel or otherwise. *Doe* v. *Sanger*, 298

7. *A miner leaving a discovery half located* to prospect for and stake other claims cannot rightfully ask the forbearance of other prospectors seeking to locate the first discovery claim. *Burke* v. *McDonald*, 325

8. *Claim staked too long or too wide.*—An excessive enclosure within the lines may avoid the entire claim, but this will not be extended to slight excess attributable to the difficult character of the ground. The claim in this instance held valid with statement that no exact figures or uniform rule can be laid down to cover all such cases. *Id.*

LOCATION. *Continued.*

9. *The ownership of intersecting veins* is determined as between locators by priority of title. *Stinchfield* v. *Gillis*, 497

10. *Survey not on course of vein.*—Rev. St. U. S. § 2320, providing that a mining claim shall not exceed 1,500 feet in length along the vein or lode, does not require the claim, in order to be valid, to be located along the course of a lode. *Watervale Co.* v. *Leach*, 568

11. *Incidental occupation, not location.*—The use of an unclaimed piece of ground by a mining company for buildings and for the construction of a tunnel thereunder to aid in the working of the company's claim does not initiate any right to the ground as an independent mining claim. *Waterloo Co.* v. *Doe*, 586

12. *A lode discovered in a tunnel run through patented ground by license*, may be lawfully located by the licensee—whether he becomes a trustee for the owner of the tunnel, not decided. *Hall* v. *Kearny*, 594

13. *Marking location.*—The location of a vein or lode, under the mining laws of the United States, is made by taking up a piece of land in the form of a parallelogram, not exceeding 1,500 feet in length and 600 feet in width, 300 feet on each side of the middle of the vein at the surface. The location must be distinctly marked on the ground, so that its boundaries can be readily traced. *Book* v. *Justice Co.*, 617

14. *Character and condition of ground.*—The question as to the sufficiency of the marking of the boundaries depends to some extent upon the character and condition of the ground located. Where the location is made upon a comparatively barren hillside, the posting of stakes at each of the four corners of the location, either by driving the stakes into the ground, or building of stone monuments so as to keep the stakes in place, is a sufficient compliance with the provisions of the law. *Id.*

15. *Removal of stakes after right vested.*—When the location is marked so that its boundaries can be readily traced, the locator's right of possession becomes fully vested, and cannot be divested by the removal or obliteration of the stakes, monuments or notice, without the act or fault of the locator, if he performs the other acts required by law. *Id.*

16. *Location without posting notice.*—The mining laws of the United States do not require any written notice to be posted upon the location when made, and, in the absence of any local rule or regulation or state law requiring a notice to be posted, the location, the boundaries of which are properly marked upon the ground, is valid without the posting of any notice. *Id.*

See AGENT, 2; APEX, DISCOVERY, END LINES, ESTOPPEL, 4; PATENT, 3; SIDE VEINS.

LOCATION CERTIFICATE.

1. *An amended location certificate filed after suit brought* is admissible in evidence. *Strepey* v. *Stark*, 28

2. *A location certificate is not title* nor proof of title, but contains a description of what ground is appropriated, becomes constructive notice of the locator's possession and is one of the steps necessary to make a perfect mining location. *Id.*

3. *Essentials of location certificate.*—There must be made and filed by the locators of said claim a location certificate which shall contain the names of the locators, the date of the location, and such a description of the claim by reference to some natural object or permanent monument as will identify the claim; also, the number of feet in length claimed on each side of the center of the discovery shaft, and the general course of the lode. *Cheesman* v. *Shreeve*, 260

4. *The certificates of location are presumptive evidence* of discovery and that the locators had complied with the law. *Id.*

5. *Location notice liberally construed.*—Where the statutes of the state, or local rules and regulations of miners, require notice to be posted upon the ground at the time the location is made, the construction given to the notices should be liberal, not technical. *Book* v. *Justice Co.*, 617

6. *Mistaken call corrected by the stakes.*—A mistake in the notice as to the direction and course, being "northerly" instead of "northeasterly," does not invalidate the location. Positive exactness as to the course is not required. The stakes and monuments referred to in the notice, and posted upon the ground, will control the direction stated in the notice. *Id.*

7. *Tying to another mining claim.*—When a notice of location is recorded, it must contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim. A reference to a known mining claim is a sufficient compliance with the law requiring reference to be made to some natural object or permanent monument. *Id.*

8. *The location certificate* in Montana is required by statute to be verified. *Mattingly* v. *Lewisohn*, 693

See PLACERS, 2.

LODE.

1. *Lode defined.*—Citation of the various definitions used in determining what is meant by the term lode in the Mining Act. *Duggan* v. *Davey*, 59

2. *Lode defined.*—A vein or lode is a body of mineral or of mineralized rock in place, within defined boundaries, in the gen-

LODE. *Continued.*

eral mass of the mountain. *Cheesman* v. *Shreeve*, 261

3. *Ore disseminated at intervals, or found in channels*, chutes, cavities, pockets, or other irregular occurrences at intervals in quartzite, without ore connections between the same, is not a lode, ledge or vein, within the meaning of Rev. St. U. S. § 2322, allowing the owner thereof to follow the same beyond his side lines upon its dip. *Id.*

4. *Continuity of vein.*—The vein must be continuous only in the sense that it can be traced by the miner through the surrounding rocks. Slight interruptions of the mineral-bearing rock are not alone sufficient to destroy the identity of the vein; nor would a short partial closure of the fissure have the effect to destroy the continuity of the vein, if, a little further on, it appeared or recurred again, with mineral-bearing rock in it. *Id.*

5. *Close or disappearance of the vein.*—Where both mineral and fissure close, come to an end, and are not found again in that direction, or, if found at all, are so far off from the tracing of the vein, or so diverted from its original trend or line, or appear under different geological conditions and surroundings, the jury would be warranted in finding that the continuity was broken, and that the lode, therefore, was not the same. *Id.*

6. *Neither pay ore nor walls are required to be shown* in the discovery, but there must be a visible vein disclosed by the presence of ledge matter distinguishable from the country rock. *Burke* v. *McDonald*, 325

7. *Blanket vein.*—The title to portions of a horizontal vein or deposit, generally called a "blanket vein," may be acquired under the sections of the revised statutes concerning veins, lodes, etc. *Iron S. Co.*, v. *Mike & S. Co.*, 436

8. *By "rock in place,"* as used in the mining statutes, is meant rock that is enclosed and embraced in the general mass of the mountain, as distinguished from the float, soil, and débris of the surface; and it is not material where the rock or mineral was originally formed or deposited, or that the vein matter is loose or broken or disintegrated. *Jones* v. *Prospect Mtn. Co.*, 530

9. *Pay ore not essential—Expert testimony.*—The value of the testimony of experts as to what constitutes a vein or lode depends to a great extent upon the strength or weakness of the reasons given in support of the conclusions reached. An expert witness testified that he would not call any discovery of rock-bearing mineral a vein or lode, unless gold or silver was found in sufficient quantities to pay all the expenses of the extracting, removing and milling the ore therefrom, and leave a profit to the owner. *Held*, that the statute is not susceptible of any such construction. *Book* v. *Justice Co.*, 620

LODE. *Continued.*

10. *"Vein or lode" defined—Authorities reviewed.*—The words "vein or lode," as used in the United States statutes, and as understood by miners, are applicable to any body or belt of mineralized rock lying within clearly-defined boundaries, separating it from the country, or non-mineral rock. Authorities as to the definition of "lodes or veins" reviewed at length, and the consideration, weight and application thereof stated. *Id.*

11. *Lode or no lode a question of fact.*—It is always a question of fact, to be determined by a jury, or by the court, if the case is tried without a jury, whether a vein or lode has been discovered or exists within the limits of the location in controversy, and also as the continuity of ore and mineral matter constituting the length, width, and extent of any particular vein or lode. *Id.*

12. *Smaller seam in larger zone.*—The facts of this case as to the character of the yellow porphyry rock wherein the vein matter is found, and the purple prophyry rock by which it is bounded, reviewed at length. *Held*, that the preponderance of the evidence shows that within this belt of yellow porphyry are numerous seams, crevices, fissures, and deposits where the quartz rock and decomposed rock and matter are found, containing mineral sufficiently diffused to justify miners in giving to the yellow porphyry the general designation of "mineralized matter,—metal-bearing rock." *Id.*

13. *Three veins dipping so as to unite or cross.*—Plaintiff owned two mining claims, the veins of which united below the surface, and, at a much greater depth, met the vein of defendants' claim, which had been located long after the location of the older of plaintiff's claims. In ejectment for the vein below the point of meeting, which plaintiff claimed under Rev. St. § 2336, as having the prior location, the only issue was whether the veins united or crossed each other. *Held*, that it was immaterial whether the location of plaintiff's junior claim was prior or subsequent to defendants' location, and rulings upon evidence on that question, if erroneous, were not prejudicial to plaintiff. *Little Josephine Co.* v. *Fullerton*, 664

See APEX, CROSS LODE, END LINES, FAULT, KNOWN LODE, LOCATION, SIDE VEINS.

MASTER AND SERVANT—See NEGLIGENCE.

MEASURE OF DAMAGES.

1. *The measure of damages for failing to continue* a mining excavation to the point fixed by contract is the reasonable price or value of the work necessary to complete the agreed depth. But this rule does not apply in this case unless the vein of mineral

MEASURE OF DAMAGES. *Continued.*

continued beyond the point where defendant ceased work. *Woodworth* v. *McLean*, 194

2. *Confusion of ores.*—If the jury believe from the evidence that defendants, after knowledge that plaintiffs contested their rights to the mine within the side lines of plaintiffs' claim, thereafter mingled the ore taken from within plaintiffs' side lines with other ore, with the purpose of preventing or obstructing the ascertainment of its quantity and value, or in wilful disregard of plaintiffs' rights, they would be warranted in construing such conduct against defendants in determining the damages. *Cheesman* v. *Shreeve*, 261

3. *Ores mined and marketed in good faith.*—If, on the other hand, they believe that defendants, in the honest belief that they were pursuing their own vein of ore, and without any design to cover up the quantity or value of ore taken, and in the usual mode of handling and marketing such ore, suffered it to mingle with other ore, or failed to keep it segregated, then the jury should ascertain the approximate value of the ore, as best they could, from all the facts before them. *Id.*

4. *Future damages in surface support case.*—Damages already suffered and those likely to result from support already removed may be recovered, but not damages for support not yet removed. *McGowan* v. *Bailey*, 425

5. *Where the trespass is knowing and wilful* there should be no deductions for cost of mining; but the cost of sorting and transporting the severed ore was deducted and interest allowed on the difference. *Benson Co.* v. *Alta Co.*, 488

See ACCOUNT, 1; LEASE, 5; TROVER, 4, 5; VERDICT, 4.

MERGER—See VENDOR AND PURCHASER, 1.

MINERALS.

1. *Minerals not then known.*—A reservation of mines and minerals may include a kind of mineral not contemplated or known to exist at the time of the creation of the reservation. *Hext* v. *Gill*, 1

2. *A bed of china clay* is a mineral within the terms of a general reservation. *Id.*

See RESERVATION.

MINERAL LAND.

1. *The patent an adjudication of non-mineral charater.*—When a law of congress provides for the patenting of lands upon the ascertainment of certain facts, the land department has jurisdiction to

MINERAL LAND. *Continued.*

inquire into such facts; and the issuance of the patent is a finding in favor of the patentee that the lands are patentable. *Gale* v. *Best*, 186

2. *And thereafter such facts*, as for instance, the mineral or non-mineral character of the land, cannot be collaterally inquired into. *Id.*

MISTAKE.

1. *Lands omitted from description.*—The court not finding either fraud or mistake in the making of an oil-lease, parol evidence offered for the purpose of showing what lands, not embraced in the description, were intended to be included in the grant, is not to be admitted in aid of construction. *Duffield* v. *Hue*, 253

2. *Degree of proof to reform.*—To amend a contract the proof must be clear and convincing that it did not set forth the true intent of the parties and that the omissions occurred from oversight or mistake. *Fritzler* v. *Robinson*, 105

See EXHAUSTED MINE, 1.

NATURAL GAS.

1. *Physical distinctions between oil and gas affect construction of leases.*—A leasehold, operated for oil production, imposes on the lessee, after ascertaining the existence of oil, the duty of sinking so many wells as may be reasonably necessary, in view of the operations on adjoining lands, to secure so much of the oil from the land demised as may be obtained with profit. The duty imposed upon the lessee in a leasehold operated for gas cannot be measured by the same rule applied in the same manner as in the case of a leasehold operated for oil; the peculiar characteristics of the business of producing and transporting natural gas being such as to distinguish it for some purposes from operations for oil. *McKnight* v. *Manufacturers Co.*, 429

2. *No implied covenant to sink second gas well.*—In an action against a lessee who had drilled one paying gas well upon the premises, for not putting down other wells to protect the territory against the effect of operations on adjoining lands, it was error to charge that a failure to drill such wells was a breach of an implied covenant, imposing a liability in damages in the absence of a reasonable excuse therefor. *Id.*

3. *Lessor failing to designate place to drill.*—Moreover, when a lease provides that all wells shall be located by the lessor, he may not maintain an action against the lessee for not drilling additional wells, if he never fixed upon a location for any additional well, or called upon the lessee to locate one for him; the

NATURAL GAS. *Continued.*

lessee having no right to drill except at points indicated by the lessor. *Id.*

4. *Right to shoot the well.*—A person who has a natural gas well on his premises has the right to explode nitroglycerine therein for the purpose of increasing the flow, although such explosion may have the effect to draw gas from the land of another. *Peoples Co.* v. *Tyner*, 481

5. *But if the well be situate in a city* where the explosion would endanger the lives and property of strangers the owner must be content with the natural flow and may be enjoined from shooting. *Id.*

6. *Point of crime involved.*—The application for such an injunction cannot be defeated, because the accumulation of nitroglycerine within the corporate limits of a town or city is a crime. A private citizen may maintain an action for a public wrong, if he suffers an injury peculiar to himself, and not sustained by the general public. *Id.*

See INJUNCTION, 2, 8; LEASE.

NEGLIGENCE.

1. *In a negligence case where the evidence is conflicting* and the result left to the jury the court will not disturb their finding. *N. Y. Co.* v. *Rogers*, 123

2. *Frozen rope—Letting bucket go.*—Where the evidence showed that the hoisting bucket was a half barrel lowered with a frozen rope without a pin, or if fastened with a pin, insecurely fastened, so that the bucket fell from the rope, and the unsafe condition of the tackle was known to the defendant, a case of negligence is made out. *Id.*

3. *Miner takes the risk of the trade.*—It is the duty of mine operators to exercise reasonable diligence to avoid danger and when this is done the miner assumes the ordinary perils of the employment. *Sampson Co. v. Schaad*, 362

4. *Evidence to show defective timbering.*—In an action based on want of care in the timbering, proof may be admitted of the mode of placing of adjacent timbers as raising the inference that those particular timbers which gave way were constructed with the same faults. *Id.*

5. *Questions of negligence and contributory negligence are generally questions* of fact—the findings on which will not be disturbed where supported by evidence although the evidence be conflicting. *Id.*

6. *A trammer* is not supposed to have such knowledge of timbering as to make him guilty of contributory negligence by remaining in a mine defectively timbered. *Id.*

NEGLIGENCE. *Continued.*

7. *Only where no reasonable conclusion of negligence* can be drawn from the evidence should a nonsuit be allowed. *Berg* v. *Boston Co.*, 470

8. *Not allowing time after misfire.*—Where the foreman after waiting 10 or 12 minutes after the fuse had been fired, remarked "I guess the blast is dead" and sent the plaintiff, a laborer not familiar with or in charge of the blasting, to work within reach of the explosion which followed, there is sufficient evidence of negligence to go to the jury. *Id.*

See SPRINGS.

NEW TRIAL.

1. *The denial of a motion for a new trial is not subject to review* in the federal appellate courts. *Little Josephine Co.* v. *Fullerton*, 664

NONSUIT.

1. *A motion for a nonsuit* is practically a demurrer to the evidence. *Berg* v. *Boston Co.*, 470

See NEGLIGENCE, 7.

OIL.

1. *An oil lease is a grant of the right to search* for oil and the second party does not become a tenant until oil is found. Although the right to search is incorporeal the lease is nevertheless a contract concerning lands and within the recording acts. *McNish* v. *Stone*, 22

2. *A clause in a lease that failure to do a certain thing shall "render this lease null and void"* does not make the lease void ab initio upon failure to perform, but void only from and after the default. *Galey* v. *Kellerman*, 164

3. *Lessee no title till oil is found.*—A vested title cannot ordinarily be lost by abandonment in a less time than that fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. A lease of a right to mine for oil, etc., stands on different ground. The title is inchoate and for purposes of exploration only until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract. *Venture Co.* v. *Fretts*, 543

See EJECTMENT, 8; INJUNCTION, 2; LEASE, NATURAL GAS, TROVER, 1.

ORE.

1. *Sold before mined, to secure creditor.*—The contract of a mine operator with his suppliers by which he agrees to deliver the ore as mined to secure the store bill, although containing words of present transfer does not pass title until delivery of the ore. *Finding* v. *Hartman*, 333

2. *Sale complete on delivery.*—A lot of ore mined under such contract and loaded onto a car sealed and billed to the merchant is delivered, and a creditor of the mine attaching the same takes nothing by his levy. *Id.*

3. *Such contract is not within the statute of frauds* nor void as against creditors, as a sale without delivery because it does not purport to be a sale until delivery. *Id.*

4. *Contract sale involved with special bill of sale to agent.*—When a mine by contract sold and agreed to deliver all its ores to a certain ore buyer the fact that as to a particular lot of ore the mine owner subsequently gave a bill of sale to and in the name of the agent of the ore buyer does not make a sale to such agent personally, nor affect the real sale and actual delivery to his principals for whom such agent is acting. *West* v. *Humphrey*, 367

5. *Ore severed under claim of title.*—Trover will not lie at the suit of the owner of land against a person who severs and converts to his own use what was a part of the realty, such as timber, ores, etc., if at the time of severance the defendant was in adverse possession of the realty under a bona fide claim of title. *Lehigh Co.* v. *New Jersey Co.*, 600

See CONVEYANCE, 5, 6; CROSS LODE, 1, 2; DELIVERY, MEASURE OF DAMAGES, 2, 3; TROVER.

PARTITION.

1. *After disseizin.*—One tenant in common cannot maintain an action for partition of land against his co-tenant where he has been disseized. *Haeussler* v. *Missouri Co.*, 458

2. *Agreement to never part.*—An agreement between co-tenants of land that neither they nor their heirs or assigns shall ever institute suit for the partition of the property is void as being an unreasonable restraint on the enjoyment of property. *Id.*

3. *Partition subject to outstanding lease.*—Possession of land by a tenant under a perpetual mining lease is no objection to a partition suit between the co-owners, subject to the rights of the tenant. *Id.*

PATENT.

1. *The federal construction* of the grants of the United States must prevail against local interpretation. *Gale* v. *Best*, 186

2. *R. R. patentee holds against mining locator.*—Where land is patented to a railroad, under a grant providing for its disposal as agricultural land, without any reservation in the grant except a general one of mineral lands, and no reservation in the patent, the patent is a conclusive determination by the government that the land is agricultural; and in an action at law to recover possession, by one claiming title under the company, against persons claiming under a location of a mining claim upon the public domain, the character of the land cannot be brought in question. *Id.*

3. *The patent is a conclusive determination of the true location* of the mining claim it describes. *Waterloo Co.* v. *Doe*, 586

See EVIDENCE, 4; MINERAL LAND, RELATION, TENANTS IN COMMON.

PLACERS.

1. *A stone quarry* may be located as a placer claim. *Freezer* v. *Sweeney*, 179

2. *Misdesignation in location certificate.*—The fact that the locator in his certificate describes the claim as a "placer mining or stone quarry claim" does not limit his rights to the stone quarry, but he is entitled to all mineral found therein, excepting known lodes. *Id.*

3. *Legal subdivisions must be staked.*—Defendant's grantor posted notice locating a certain governmental subdivision; the S. W. ¼ of the N. W. ¼ of Sec. 22 etc. He did not renew nor seek for the government stakes: *Held*, that the claim was not marked on the ground as required by the act, and that such act applied to locations of legal subdivisions of surveyed lands. *White* v. *Lee*, 209

4. *The term "known vein"* as used in the mining acts excluding known veins from the grant of a placer patent, includes a lode whose existence has been disclosed although it may never have been appropriated by location. *Iron S. Co.* v. *Mike & S. Co.*, 436

5. *Date when known.*—Such vein to be excepted must have been known to exist at the date of the application for the placer patent and not merely at the date of patent itself. *Id.*

See KNOWN LODE.

PLEADING.

1. *Waiver of replication.*—A new party having been substituted in the case, amended complaint and answer substantially the same as the original were thereupon filed but no new replication was filed. Trial was had without objection on this point: *Held*, that it was too late to be taken advantage of in the appellate court. *Argentine Co.* v. *Terrible Co.*, 109

2. *Misnomer of pleadings.*—What is in effect an answer is to be treated as such, though misstyled a cross-complaint by defendant. *Mills* v. *Fletcher*, 671

See EJECTMENT, FRAUD, 4; PRACTICE.

POSSESSION.

1. *To constitute a valid possession* of a mining claim neither residence nor continuous occupation are essential. *Strepey* v. *Stark*, 28

See ADVERSE POSSESSION, LOCATION, 10.

PRACTICE.

1. *The refusal to submit special issues* is reversible error where such issues were properly requested in a complicated case. *Burke* v. *McDonald*, 325

See EJECTMENT, INSTRUCTIONS, NEW TRIAL, NON-SUIT, PLEADING, TRESPASS, TRIAL, TROVER, VERDICT.

PROMOTERS.

1. *Promoters of a corporation who on its formation become officers* thereof must be treated as its agents and trustees, and held accountable to it for any profits which they realize upon property bought for and sold to the corporation. *Pittsburg Co.* v. *Spooner*, 226

See CORPORATIONS, 1, 3; FRAUD, 7.

PROSPECTING CONTRACT.

1. *Time against board—Failure to board.*—Where an outfitter agrees to board a party while prospecting as consideration for an interest in any mines the prospector may find or buy—and the outfitter becomes insolvent and so unable to and does not keep his contract to furnish board, he is not entitled to any share in the discoveries. *Miller* v. *Butterfield*, 222

2. *Such an agreement as to mines bought* necessarily implies that the outfitter should pay or tender his half of the price paid for such purchases. *Id.*

PROSPECTING CONTRACT. *Continued.*

3. *A written prospecting contract cannot be varied by parol;* and a subsequent verbal arrangement as to the management or disposal of the properties to be acquired is immaterial. *Id.*

See LICENSE, 1.

QUARRY—See PLACERS, 1.

QUIET TITLE.

1. *Right of owner in possession to quiet title.*—In Utah a complaint which alleges that the plaintiff is owner and in possession of land, that the defendant claims an adverse interest or estate therein, that such claim is without legal or equitable foundation and is void, and that it is a cloud on the plaintiff's title and embarrasses him in the use and disposition of his property and depreciates his property, and which prays for equitable relief in these respects, is sufficient to require the adverse claim on the part of the defendant to be set up, inquired into and judicially determined, and the question of title finally settled. *Parleys Park Co.* v. *Kerr*, 201

RELATION.

1. *The right to a patent once vested* is treated by the government as a patent issued and when issued it relates back. *Benson Co.* v. *Alta Co.*, 488

RELOCATION.

1. *Relocator has no right to connect with the old title.*—If ground once included within the location of a lode mining claim be abandoned, and a new location made thereon, as abandoned ground, said location dates only from the relocation thereof and does not relate back to or obtain any rights on account of the location which has been abandoned. *Cheesman* v. *Shreeve*, 260

2. *When relocation cannot be made.*—Mining claims are not open to relocation until the rights of the former locator have come to an end. No relocator of a mining claim can avail himself of the mineral in the public land which another has discovered until the prior locator has in fact abandoned the ground, or, under the provisions of the mining law, has forfeited his rights thereto. *Book* v. *Justice Co.*, 621

3. *Failure by an overlapped senior claim to do its annual labor* does not operate to vest title to the overlap in the junior overlapping claim unless the junior claim file a relocation certificate, as allowed by statute of Colorado covering such case. *Oscamp* v. *Crystal R. Co.*, 651

See INDIAN RESERVATION, 2; LOCATION CERTIFICATE, 1.

RES ADJUDICATA.

1. *A judicial determination* of a question of fact binds only the parties in the cause and their privies, and is not even evidential against others. *Lehigh Co.* v. *New Jersey Co.*, 600

RESCISSION.

1. *Misrepresentations are not merged in the contract* induced by them, but are grounds upon which to vacate it. *Barnard* v. *Roane Co.*, 94

RESERVATION.

1. *A reservation of minerals includes every substance* which can be got from underneath the surface for the purpose of profit unless there is something in the context or otherwise to restrict its meaning. *Hext* v. *Gill*, 1

2. *Where surface destruction is incident.*—The owner of a reservation of minerals in general terms cannot, except by arrangement with the surface owner, work such minerals as can be gotten only by destruction or serious injury to the surface. *Id.*

See CONVEYANCE, MINERALS.

RIGHT OF WAY—See WAY.

SALE.

1. *Informalities cured by delivery.*—After ore is delivered by its owners to a bona fide buyer, a creditor of the mine owners cannot attack the transaction for defect of parties to the bill of sale. *Finding* v. *Hartman*, 333

See ORE, 1-4.

SEVERANCE.

1. *Removal of coal by surface occupant.*—Defendants, being in lawful possession of the surface of lands belonging to plaintiffs, removed coal from under the surface: *Held*, that they were liable as trespassers. *Ashman v. Wigton*, 117

2. *The surface of land and the minerals beneath it may be dissevered* in title and become separate tenements. In case of such severance, the mineral becomes a separate corporeal hereditament, and its ownership is attended with all the attributes and incidents peculiar to the ownership of land. *Lillibridge* v. *Lackawanna Co.*, 412

SIDE VEINS.

1. *Rights of locators to the side veins.*—Where a valid discovery and location of a vein is made, and the laws in relation

SIDE VEINS. *Continued.*

thereto are fully complied with, the locator thereof is not only entitled to the vein or lode discovered by him, but every other vein or lode throughout its entire depth, the top or apex of which lies within the surface lines of his claim extended downward vertically, to which no right had attached in favor of other parties at the time his location was made. *Book* v. *Justice Co.*, 621

SPRINGS.

1. *Well destroyed by salt water from oil drilling.*—One who bores for oil or gas is responsible for an injury to a neighboring water well, arising from the commingling by his well of salt and fresh waters percolating underground, where such injury was plainly to be anticipated, and was preventable by the exercise of reasonable care at a reasonable cost. *Collins* v. *Chartiers Val. Co.*, 383

2. *Proper precautions would have prevented.*—The defendant is liable, in such case, not because, in the exercise of his own legal right, he has necessarily injured the plaintiff, but because he has injured him unnecessarily, by his neglect to adopt such reasonable precaution as might and should have been taken to protect him. *Id.*

STATUTE OF FRAUDS—See TRUSTS.

STATUTE OF LIMITATIONS.

1. *Statute of limitations in cases of remote result.*—When the wrong consisted in the original trespass, the breaking through the barrier, and the injury did not occur until years after by the abandonment of the mine and the over-flow of its water through the opening, the statute of limitations begins to run from the date of the wrong, not the date of the injury. *National Co.* v. *Minnesota Co.*, 44

2. *Title under statute of limitations.*—The allegation in the complaint that a valid and legal location of the tunnel was made by persons under whom plaintiff claims, and that plaintiff had held possession of the same for more than five consecutive years prior to the ouster by defendants, and paid all the taxes assessed during that period, shows a right in plaintiff to the premises in dispute, under the laws of Colorado, superior to any other claims except that of the government. *Glacier Mtn. Co.* v. *Willis*, 127

See ADVERSE POSSESSION.

SURFACE—See RESERVATION, 2; SEVERANCE.

SURFACE SUPPORT—See LEASE, 4; MEASURE OF DAMAGES, 4.

TENANTS IN COMMON.

1. *The relation of co-tenant is in no sense one of partnership.*—Any co-tenant may work, and if he cannot get his own without taking that which belongs to his associates, and they assume not the risk, they cannot hold him for the profits. *Fulmer's App.*, 246

2. *No absolute rule of contribution can* be made to apply to all cases; the circumstances of each must be considered. *Id.*

3. *The holder of a sheriff's certificate of sale* is not a co-owner. The title is in the judgment debtor until the sheriff's deed issues. *Turner* v. *Sawyer*, 683

4. *Patent procured by co-owner.*—The owner of a part interest in a mining claim is a co-tenant with the other owners; and if, without their knowledge he procures a patent in his own name, he becomes a trustee for them, and equity will enforce the trust in their favor. *Id.*

See ACCOUNT, ADVERSE CLAIM, 15; ANNUAL LABOR, 14.

TOWNSITE.

1. *Lode in townsite—Once valuable, later abandoned and again found valuable.*—Under the statutes of the United States, a ledge containing gold-bearing rock, which has formerly been profitably worked for mining purposes, but all work upon which has been abandoned, and which, at the date of a town-site patent of the land within which it lies, is not known to be valuable for mining purposes, is not excepted from the operation of the town-site patent, although, after the town-site patent has taken effect, the land is found to be still valuable for mining purposes. *Dower* v. *Richards*, 704

2. *No federal question on a finding of fact.*—The rule that the supreme court has no authority to review questions of fact upon error extends to a case in which a state supreme court finds against the existence of a fact relied upon by the plaintiff in error as raising a federal question; as, where he contended that the granting of a town-site patent on lands known to be valuable for mining purposes did not prevent the subsequent location of a mining claim thereon, and the court found that the lands were not known to be valuable for mining at the time the patent took effect. *Id.*

TRESPASS.

1. *Ordinary action not convertible into suit for penalty.*—The common law action of trespass cannot be converted into a statutory action for a penalty (treble damages for cutting timber) by amendment of the declaration. *Fairchild* v. *Dunbar Co.*, 242

See BARRIERS, 3; MEASURE OF DAMAGES; SEVERANCE, 1.

TRIAL.

1. *Remarks of court to jury* exhorting to an agreement on a third trial of the case considered and upheld. *Strepey* v. *Stark*, 28

2. *The stenographer's notes of the testimony* may be read to the jury after their retirement, when they return into court asking to be refreshed on the evidence. *Freezer* v. *Sweeney*, 179

TROVER.

1. *Oil taken by party in possession.*—The true owner of land may not sustain trover for the value of oil, or other products of realty, produced and removed from the premises in the exercise of a colorable title, without fraud or force, by one in adverse possession. *National Co.* v. *Weston*, 143

2. *Law changed as to replevin only.*—The act of May 15, 1871, P. L 268, authorizing replevin for chattels severed from realty, though the title be in dispute, is limited to that form of action, and the only other proper remedy remaining to the owner is ejectment, and proceedings for mesne profits. *Id.*

3. *Lessee may maintain trover for ore taken.*—When plaintiff is in possession of land under a mining lease which gives him the exclusive right to mine for a certain term of years, subject to the payment of a royalty, and requires him to mine 7,000 tons each year, and as much more as can reasonably be mined on the land, and by which he is bound to pay for 7,000 tons each year, whether mined or not, but with the privilege of crediting any such payment for ore not mined on ore mined in excess of 7,000 tons in any succeeding year, he has such property in the ore before it is mined that he can maintain trover against one who mines it without his consent. *Hartford Co.* v. *Cambria Co.*, 515

4. *Measure of damages.*—In such an action plaintiff may recover damages equal to the value of the ore mined, less the actual cost of mining it, and less any royalty which may have been paid by defendant to plaintiff's lessor. *Id.*

5. *Defense of ore taken by party in possession.*—In such an action it is no defense that defendant mined the ore while in possession under claim of right, when his only possession was that which enabled him to convert the ore. *Id.*

See ORE, 5.

TRUSTS.

1. *When a mining location is made by one person in his own name*, at the request and expense of, and for the benefit of another person, such other person is legally entitled to the possession of the mining ground so located. The locator, in such a case, holds the legal title in trust for the benefit of the person at whose expense the location was made. *Book* v. *Justice Co.*, 619

TRUSTS. *Continued.*

2. *Statute of frauds not applicable.—Held*, that the statute of frauds had no application to the facts of this case; that, the locators of the ground having voluntarily conveyed the title to the corporation, no objection could be urged by strangers to the transaction on the ground that the original agreement as to the location of the claims was not in writing. *Id.*

See ESTOPPEL, 5.

TUNNELS.

1. *Locations prior to Act of 1872—5,000 foot tunnel.*—All mineral locations are to be governed by the local rules and customs in force at the time of the location, when such location was made prior to the passage of any mineral law by congress. Hence, although Rev. St. U. S. § 2323, gives the right to locate a tunnel 3,000 feet only from the face thereof, the location of a tunnel 5,000 feet in length, made prior to the enactment of that law, in accordance with local rules and customs, is valid. *Glacier Mtn. Co.* v. *Willis*, 127

See ANNUAL LABOR, 9; COVENANT, 2; EJECTMENT, 3.

USAGE.

1. *Limit to scope of usage.*—Evidence of a local usage may be received to modify a contract or explain the intention of the parties, in case of ambiguity, but not of itself to create a liability or establish a contract. *Ulmer* v. *Farnsworth*, 134

See DRAINAGE, 2.

VENDOR AND PURCHASER.

1. *Preliminary contract not merged in deed.*—A stipulation contained in a contract for the sale of land, but omitted from the deed executed in pursuance of the contract, will not be extinguished by the merger, when its place is not taken or supplied by the express or implied operation of the provisions and covenants which the deed does contain. *McGowan* v. *Bailey*, 425

2. *Instance—Right of way.*—A stipulation, in a contract for the sale of coal, to convey along with it certain mining rights to be exercised on the surface of the land, was not merged in a deed afterwards made for the coal which omitted to convey such rights; and it was admissible in defence to an action against the vendee for trespassing upon the surface. *Id.*

See ESTOPPEL; FRAUD.

VERDICT.

1. *A special finding controls* a general verdict. *Larkin* v. *Upton*, 465

2. *If findings are susceptible of two constructions* that one will be preferred which is consistent with the verdict. *Id.*

3. *Verdict failing to cover ore at point of crossing.*—A judgment on a general verdict for defendants in such action will not be reversed because it fails to define plaintiff's rights, under Rev. St. § 2336, to the ore within the space of intersection of the veins; where the question was not called to the attention of the court either before the verdict or when it was received, and where a statute of the state provides that a verdict for part of the premises claimed shall particularly specify such part. *Little Josephine Co.* v. *Fullerton*, 664

4. *Amount in verdict binding on court.*—The court in a law action cannot disregard the amount of damages found by the verdict and substitute their own finding. *Mills* v. *Fletcher*, 671

See ADVERSE CLAIM, 3; ANNUAL LABOR, 16.

WAIVER.—See FORFEITURE, 1.

WATER.

1. *Change of place of use after second appropriation.*—The appropriator of water, to be used at a specified place for the purpose of operating machinery and other works, after so using and returning it to its original channel, cannot change the place of use, to the damage of a subsequent appropriator lower down on the stream. *Last Chance Co.* v. *Bunker Hill Co.*, 449

2. *Facts of the case to which above rule was applied.*—Water was carried by a ditch to defendant's ore mill, there used and returned to the stream. Later in time and below on the stream it was tapped by plaintiff and taken to his mill. Afterwards defendant made a ditch above plaintiff's point of diversion and led the water around and below him. *Id.*

WAY.

1. *Right of way under and over ground—Essential incidents aid construction.*—The grantor granted all the coal under his farm, with the "right of way for railroads over the surface at the crossing of ravines," and the privilege to grantees of "running their coal from other lands through the entries and railways made and used in taking out the coal above granted." The grantees owned the coal under the adjoining farm, the two farms being separated

WAY. *Continued.*

by a deep ravine, and the topography of the ground being such that coal from the latter farm could not be transported through the entries under grantor's land, except by connecting such entries with the coal on the other side of the ravine by means of a surface road crossing from the outcrop on one side to the outcrop on the other. *Held*, that the right to bring coal from other land to the entries and railways under grantor's land being incident to the right to transport it over them, and the opening of a way to the surface of grantor's land, and over the ravine, being the only way of getting the coal from the other side, the right to make such way passed with the grant, though the new way may not be used for taking out the coal from grantor's land. *McCracken* v. *Gumbert*, 279

2. *Fee simple in the coal.*—An instrument in the form of a lease granting and letting "all the merchantable coal" together with the sole and exclusive right to mine and remove the same: *Held*, "an absolute grant in fee simple of all the coal under the tract." *Lillibridge* v. *Lackawanna Co.*, 412

3. *Such grantee owns the space* which was occupied by the coal before the coal was mined. *Id.*

4. *Underground right of way—Instroke.*—Being such owner it has the right to carry foreign coal through such space as it sees fit. *Id.*

5. *Inconvenience not necessity.*—A lease of coal lands reserved to the lessor and his assigns the joint use of such portions of the leased lands as might be necessary for roads, railways, waterways, side tracks, and other structures necessary for the profitable working of adjacent coal lands of the lessor and his assigns, but not so as to injuriously interfere with the workings of the lessee. *Held*, that the lessee might enjoin the making of an entry through and under his land for the purpose of mining coal on adjacent leased land, where the weight of evidence showed that the coal in the adjacent lands could be mined profitably without such entry, though not so profitably or so conveniently as with it. *Reliance Co.* v. *Kentucky Co.*, 609

6. *Underground access not reserved.*—The reservation as to "roads, railways, waterways, side-tracks, and other structures" related to surface ways for ingress and egress to the surface of the adjacent land, and did not embrace underground entries through complainant's leased land. *Id.*

7. *Subsequent leases not considered.*—The language of complainant's lease could not be enlarged or altered by the grant in a subsequent lease, of adjoining land, of all such rights of making entries and erecting structures for mining purposes under, through, or upon complainant's leased land as the lessor was competent to

WAY. *Continued.*

grant, since the lessor could grant no rights over complainant's land, except in strict conformity with the reservations of complainant's lease. *Id.*

8. *Exclusive use—Not joint use.*—A reservation in a lease of coal lands, retaining to the lessor or its assigns the joint use with the lessee of all such portions of the land as may be necessary for roads, tracks, or structures for the profitable working of other lands in the vicinity, does not authorize a structure designed for the exclusive use of the lessor's assigns. *Id.*

See VENDOR and PURCHASER, 2.

WITNESS.

1. *Representative of deceased party as witness.*—When the lessor of an oil-lease is dead, and his right, under and subject to it by his own act or the act of the law has passed to the defendant in an ejectment, who represents his interest in the subject in controversy, neither the surviving party to the transaction sought to be proved, nor the plaintiff in the action, though released by the party offering him, is a competent witness. *Duffield* v. *Hue*, 253

2. *Idem.*—It does not follow, that in all cases where a party to an action derives his title through or under a deceased grantor, neither party can be a witness; it is where a party to a thing or contract in action is dead, etc., and a party to the action represents his interest in "the subject in controversy." *Id.*

3. *Idem.*—As a person cannot be supposed to become a party to a thing or contract in action, until after the thing or contract in action has come into being, this rule of incompetency cannot arise until the thing or contract in action, "the subject in controversy," exists. *Id.*

WORKINGS.

1. *Contract to sink on vein—Vein disappears.*—Defendant stipulated to sink a mining shaft five hundred feet "on the vein of ore cropping out on said claim." If, in the progress of the work, all indications of valuable material ceased and the vein of ore ran out entirely, there was no obligation on him to proceed further. *Woodworth* v. *McLean*, 194

2. *Burden on contractor to prove lost vein.*—When, in a suit for damages on account of a failure to execute such contract, it is proved that the work stopped within the five hundred feet, the burden of proof rests on defendant to show that the vein of ore, down which the shaft was to proceed, had terminated. *Id.*

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